No. 14-8349 ***CAPITAL CASE***

Title: Timothy Tyrone Foster, Petitioner
v.
Bruce Chatman, Warden

Docketed: February 6, 2015

Lower Ct: Superior Court of Georgia, Butts County

Case Nos.: (1989-V-2275)

Decision Date: December 9, 2013

Discretionary Court
Decision Date: November 3, 2014

Questions Presented

—Date—	——Proceedings and Orders----------
Jan 30 2015	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 9, 2015)
Mar 9 2015	Brief of respondent Bruce Chatman, Warden in opposition filed.
Mar 24 2015	Reply of petitioner Timothy Tyrone Foster filed. (Distributed)
Mar 26 2015	DISTRIBUTED for Conference of April 17, 2015.
Apr 17 2015	Record Requested .
Apr 20 2015	DISTRIBUTED for Conference of April 24, 2015.
Apr 22 2015	Record received from Superior Court of Georgia, Butts County (6 boxes).
Apr 27 2015	DISTRIBUTED for Conference of May 1, 2015.
May 4 2015	DISTRIBUTED for Conference of May 14, 2015.
May 6 2015	Record received from the Supreme Court of Georgia. The record is electronic.
May 18 2015	DISTRIBUTED for Conference of May 21, 2015.
May 26 2015	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jun 9 2015	Motion to appoint counsel filed by petitioner Timothy Tyrone Foster.
Jun 15 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 24, 2015.
Jun 15 2015	The time to file respondent's brief on the merits is extended to and including September 8, 2015.
Jun 17 2015	Motion DISTRIBUTED for Conference of September 28, 2015.
Jul 24 2015	Joint appendix filed (2 Volumes). (Statement of costs filed)
Jul 24 2015	Brief of petitioner Timothy Tyrone Foster filed.
Jul 31 2015	Brief amici curiae of Joseph diGenova, et al. filed.
Sep 8 2015	Brief of respondent Bruce Chatman, Warden filed
Sep 9 2015	SET FOR ARGUMENT on Monday, November 2, 2015
Sep 21 2015	CIRCULATED
Oct 5 2015	Motion to appoint counsel filed by petitioner GRANTED. and Stephen B. Bright,

	Esquire, of Atlanta, Georgia, is appointed to serve as counsel for the petitioner in this case.
Oct 6 2015	Reply of petitioner Timothy Tyrone Foster filed. (Distributed)
Oct 30 2015	Letter from Clerk of Court advising that counsel should be prepared to discuss at oral argument whether certiorari in this case should be directed to the Supreme Court of Georgia or the Superior Court of Butts County, Georgia, and what significance, if any, that determination may have on the Court's resolution of the case.
Nov 2 2015	Argued. For petitioner: Stephen B. Bright, Atlanta, Ga. (Appointed by this Court.) For respondent: Beth A. Burton, Deputy Attorney General, Atlanta, Ga.

No. 14-8349

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY TYRONE FOSTER,

Petitioner,

v.

CARL HUMPHREY, WARDEN,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

STEPHEN B. BRIGHT
Counsel of Record
PATRICK MULVANEY
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
sbright@schr.org
pmulvaney@schr.org

January 30, 2015

CAPITAL CASE

QUESTION PRESENTED

In this capital case involving a black defendant and a white victim, Georgia struck all four black prospective jurors and provided roughly a dozen "race-neutral" reasons for each of the four strikes. The prosecutor later argued that the jury should impose a death sentence to "deter other people out there in the projects." At the trial level and on direct appeal, Georgia's courts denied the defendant's claim of race discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986).

In habeas proceedings, the defendant obtained the prosecution's notes from jury selection, which were previously withheld. The notes reflect that the prosecution (1) marked the name of each black prospective juror in green highlighter on four different copies of the jury list; (2) circled the word "BLACK" next to the "Race" question on the juror questionnaires of five black prospective jurors; (3) identified three black prospective jurors as "B#1," "B#2," and "B#3"; (4) ranked the black prospective jurors against each other in case "it comes down to having to pick one of the black jurors;" and (5) created strike lists that contradict the "race-neutral" explanation provided by the prosecution for its strike of one of the black prospective jurors. The Georgia courts again declined to find a *Batson* violation.

The question presented is this:

> Did the Georgia courts err in failing to recognize race discrimination under *Batson* in the extraordinary circumstances of this death penalty case?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Timothy Tyrone Foster respectfully petitions this Court for a writ of certiorari to review the judgment of the Superior Court of Butts County, Georgia, denying his petition for a writ of habeas corpus in this death penalty case.

OPINIONS BELOW

The order of the Supreme Court of Georgia denying Foster's application for a certificate of probable cause to appeal from the denial of habeas relief is unreported and is attached as Appendix A. The order of the Superior Court of Butts County, Georgia, denying habeas relief is unreported and is attached as Appendix B. The decision of the Supreme Court of Georgia affirming Foster's conviction and death sentence on direct appeal, *Foster v. State*, 374 S.E.2d 188 (Ga. 1988), is attached as Appendix C. The order of the Superior Court of Floyd County, Georgia, denying Foster's motion for new trial is unreported and is attached as Appendix D. The section of the transcript in which the Superior Court of Floyd County, Georgia, denied Foster's pretrial objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), is attached as Appendix E. The prosecution's notes and records from jury selection, which were admitted at the habeas hearing, are attached as Appendix F.

JURISDICTION

The Supreme Court of Georgia denied Petitioner Foster's application for a certificate of probable cause to appeal the denial of habeas relief on November 3, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Timothy Tyrone Foster was a poor, black, intellectually compromised eighteen-year-old when he was charged in 1986 with murdering Queen White, an elderly white woman who worked as a school teacher before her retirement.

At Foster's trial in 1987, there were forty-two qualified prospective jurors. T. 1336-44.[1] Four of the forty-two—Marilyn Garrett, Eddie Hood, Mary Turner, and Evelyn Hardge—were black. The prosecution removed all four black prospective jurors by peremptory strike. T. 1337-43. Defense counsel objected pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), which prohibits the use of peremptory strikes on the basis of race. T. 1354. The trial court found a prima facie showing of

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[1] "T. __ refers to the designated page of the reporter's transcript from Foster's trial. "R. __ refers to the designated page of the clerk's record from Foster's trial. "M.N.T. __ refers to the designated page of the reporter's transcript from Foster's motion for new trial hearing. "H. __" refers to the designated page of the transcript and exhibits from the habeas hearing.

race discrimination, so the burden shifted to the prosecution to provide race-neutral explanations for each of the four strikes. T. 1356; *see Batson*, 476 U.S. at 96-98 (explaining *Batson*'s three-step process). Relying on his team s notes, T. 1374, the prosecutor proffered a combined *forty* reasons for striking Garrett, Hood, Turner and Hardge, T. 1361-77. The defense countered that the prosecutor's reasons were pretextual. T. 1365-80, but the trial court overruled the *Batson* objection. T. 1380.[2] Foster was then tried before an all-white jury and convicted of murder. T. 2444.

At the penalty phase, the prosecutor argued that the jury should impose a death sentence to "deter other people out there in the projects." T. 2505. At the time, black families occupied thirty-two of the thirty-four units in the local housing projects. R. 551. The jury sentenced Foster to death. T. 2547-51.

After the trial, Foster filed a motion for post-judgment discovery, requesting that the trial court "impanel all notes and records regarding jury selection in the possession of the State," "conduct an in camera inspection of those notes and records," and preserve "the notes and records . for appellate review and/or post conviction " R. 495. The trial court denied the motion. R. 501-03.

In his motion for new trial, Foster reasserted his argument that the prosecution had violated *Batson*. R. 375, 382-98. The prosecution responded by repeating the explanations it proffered at trial and by adding additional

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[2] The trial court actually overruled defense counsel's *Batson* objection with regard to all four black prospective jurors *before* the prosecutor provided his reasons for striking three of the four. T. 1366. After the trial court announced its ruling, the prosecutor requested permission to "perfect the record" by stating his reasons for striking the other three black prospective jurors. T. 1367. The trial court allowed further argument before overruling the objection again. T. 1377, 1380.

explanations, again relying on the prosecution team's notes. R. 424-45, 438. The trial court denied the motion for new trial. R. 563-76.

On direct appeal, the Georgia Supreme Court affirmed the trial court's ruling on the *Batson* issue. *See Foster v. State*, 374 S.E.2d 188, 192 (Ga. 1988). In doing so, the court acknowledged several of the prosecution's race-neutral explanations with respect to each black prospective juror and concluded that "[t]he trial court did not err by finding [the race-neutral explanations] to be sufficiently neutral and legitimate." *Id.* The court also affirmed the trial court's denial of Foster's discovery motion. *Id.* This Court denied certiorari. *Foster v. Georgia*, 490 U.S. 1085 (1989).

Foster filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, in 1989. The habeas court initially ordered further proceedings on the issue of intellectual disability, holding the remainder of the case in abeyance. A Floyd County jury found that Foster was not intellectually disabled in 1999, and the habeas case resumed the following year.[3]

In 2006, Foster gained access to the prosecution's jury selection notes from the 1987 trial through a request pursuant to Georgia's Open Records Act.[4] The notes include the following evidence, which Foster presented to the habeas court in support of a new *Batson* challenge:

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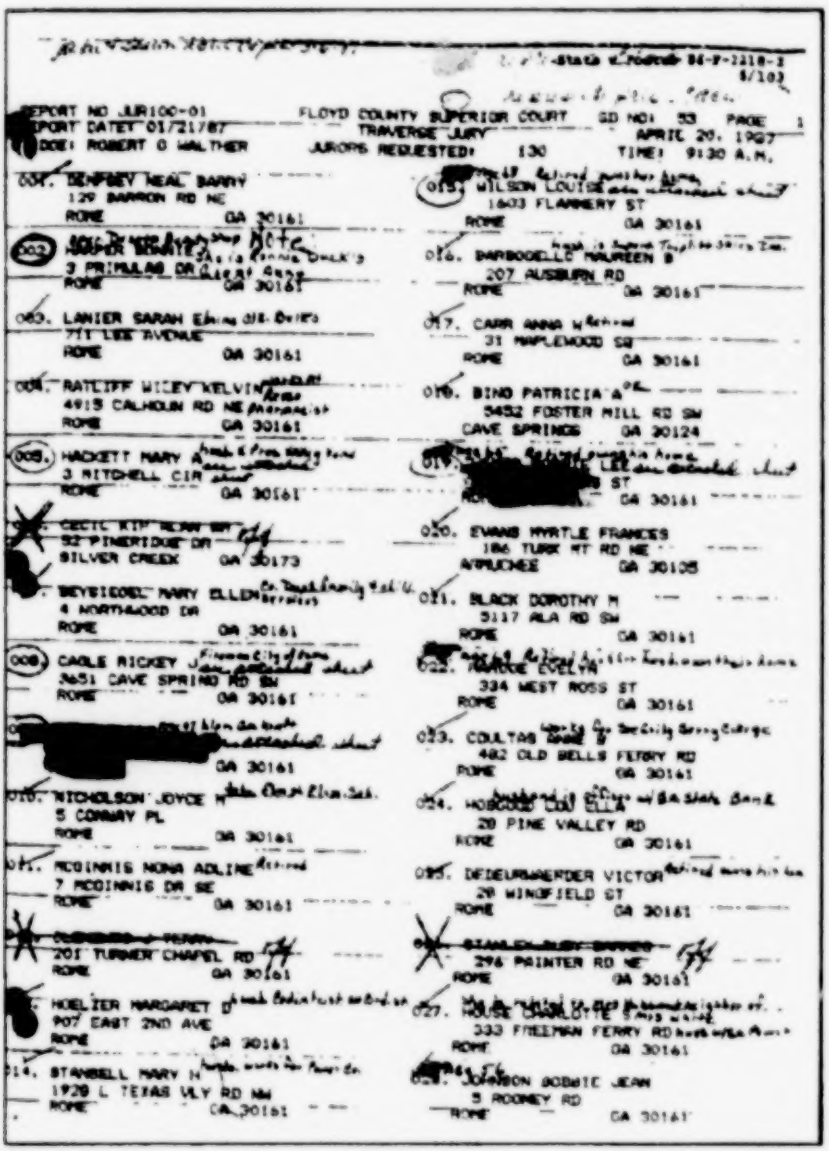
[3] The Superior Court of Butts County sent the case to the Superior Court of Floyd County, where Foster's original trial was held, for a trial on the issue of intellectual disability. On March 18, 1999, a Floyd County jury determined that Foster was not intellectually disabled. The Georgia Supreme Court affirmed on appeal, *Foster v. State*, 525 S.E.2d 78 (Ga. 2000), and this Court denied certiorari, *Foster v. Georgia*, 531 U.S. 890 (2000). The case then returned to the Superior Court of Butts County for the continuation of the habeas proceedings.

[4] The District Attorney for the Rome Judicial Circuit who provided Mr. Foster with access the notes and records in 2006 was Leigh Patterson. H. 897. The District Attorney for the Rome Judicial Circuit who prosecuted Foster in 1987 was Steve Lanier. *See* R. 11.

First, the prosecution marked the name of each black prospective juror in green highlighter on four different copies of the jury list. H. 903-26.[5] Each of the four lists includes a key in the top-right corner of the first page indicating that "[Green highlighting] Represents Blacks." H. 903, 909, 915, 921.



REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT GD NO: 53 PAGE 1
REPORT DATE: 01/21/87 TRAVERSE JURY APRIL 20, 1987
JUDGE: ROBERT O WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.

004. DEMPSEY NEAL BARRY
129 BARRON RD NE
ROME GA 30161

003. [redacted]
3 PRIMLAB DR
ROME GA 30161

005. LANIER SARAH E
771 LEE AVENUE
ROME GA 30161

006. RATCLIFF WILEY KELVIN
4915 CALHOUN RD NE
ROME GA 30161

009. HACKETT MARY A
3 MITCHELL CIR
ROME GA 30161

CECIL KIP
52 PINERIDGE DR
SILVER CREEK GA 30173

BEYBIEGEL MARY ELLEN
4 NORTHWOOD DR
ROME GA 30161

008. CAGLE RICKEY J
3651 CAVE SPRING RD SW
ROME GA 30161

[redacted]
GA 30161

010. NICHOLSON JOYCE H
5 CONWAY PL
ROME GA 30161

011. MCGINNIS NONA ADLINE
7 MCGINNIS DR SE
ROME GA 30161

[redacted]
201 TURNER CHAPEL RD
ROME GA 30161

HOELZER MARGARET D
907 EAST 2ND AVE
ROME GA 30161

014. STANBELL MARY H
1929 L TEXAS VLY RD NW
ROME GA 30161

015. WILSON LOUISE
1603 FLANNERY ST
ROME GA 30161

016. BARBOGELLO MAUREEN B
207 AUBURN RD
ROME GA 30161

017. CARR ANNA M
31 MAPLEWOOD SQ
ROME GA 30161

018. BIND PATRICIA A
5452 FOSTER MILL RD SW
CAVE SPRINGS GA 30124

[redacted]
ST
GA 30161

020. EVANS MYRTLE FRANCES
186 TURK MT RD NE
ARMUCHEE GA 30105

021. BLACK DOROTHY M
3117 ALA RD SW
ROME GA 30161

[redacted]
334 WEST ROSS ST
ROME GA 30161

023. COULTAS [redacted]
482 OLD BELLS FERRY RD
ROME GA 30161

024. HOBGOOD [redacted]
20 PINE VALLEY RD
ROME GA 30161

025. DEDEURWAERDER VICTOR
20 WINGFIELD ST
ROME GA 30161

[redacted]
296 PRINTER RD NE
ROME GA 30161

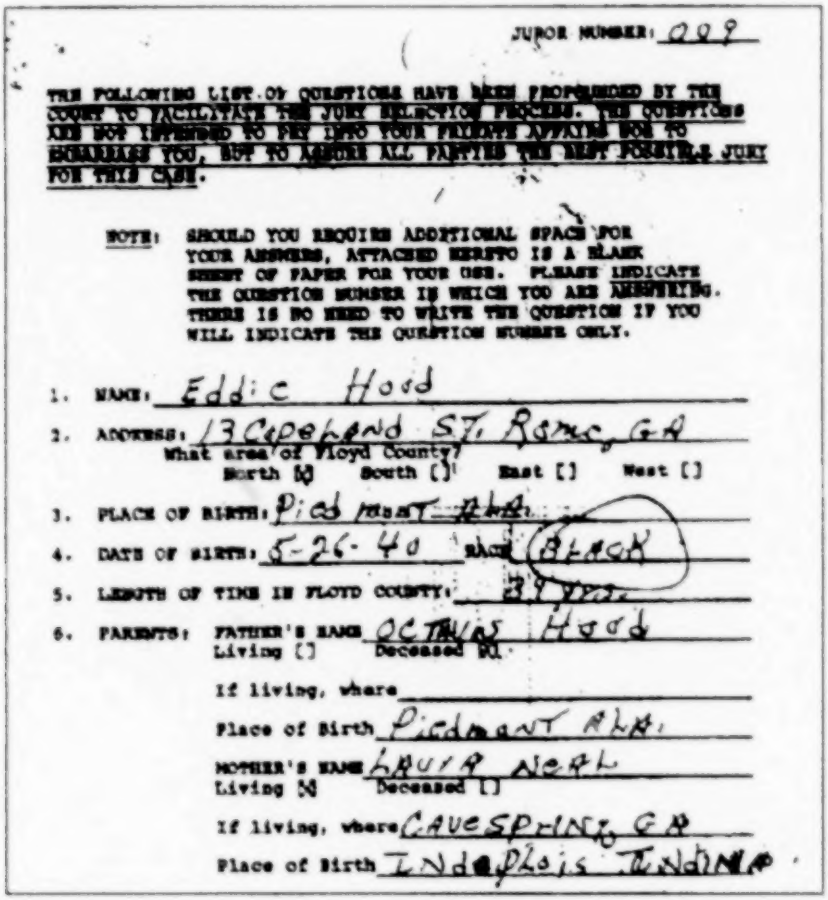
027. HOUSE CHARLOTTE
333 FREEMAN FERRY RD
ROME GA 30161

028. JOHNSON BOBBIE JEAN
5 RODNEY RD
ROME GA 30161

H. 903.

[5] *See* H. 202 (the prosecution's investigator explaining that the four lists are "four different versions of the same document [with] different handwritten notations on them").

Second, the prosecution circled the word "BLACK" next to the "Race" question on the juror questionnaires of five black prospective jurors. H. 961, 967, 973, 979, 984.



JUROR NUMBER: 099

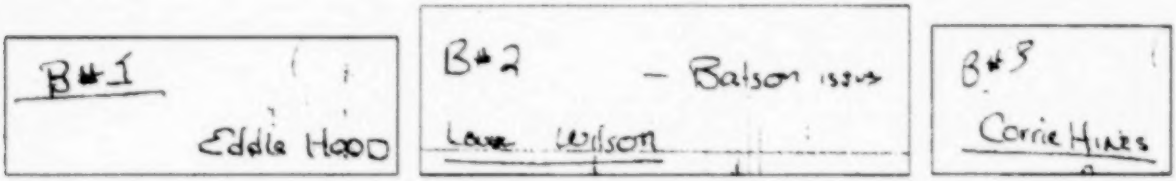
THE FOLLOWING LIST OF QUESTIONS HAVE BEEN PROPOUNDED BY THE COURT TO FACILITATE THE JURY SELECTION PROCESS. THE QUESTIONS ARE NOT INTENDED TO PRY INTO YOUR PRIVATE AFFAIRS NOR TO EMBARRASS YOU, BUT TO ASSURE ALL PARTIES THE BEST POSSIBLE JURY FOR THIS CASE.

NOTE: SHOULD YOU REQUIRE ADDITIONAL SPACE FOR YOUR ANSWERS, ATTACHED HERETO IS A BLANK SHEET OF PAPER FOR YOUR USE. PLEASE INDICATE THE QUESTION NUMBER IN WHICH YOU ARE ANSWERING. THERE IS NO NEED TO WRITE THE QUESTION IF YOU WILL INDICATE THE QUESTION NUMBER ONLY.

1. NAME: Eddie Hood
2. ADDRESS: 13 Copeland St. Rome, GA
   What area of Floyd County?
   North [X] South [ ] East [ ] West [ ]
3. PLACE OF BIRTH: Piedmont Ala.
4. DATE OF BIRTH: 5-26-40 race BLACK
5. LENGTH OF TIME IN FLOYD COUNTY: 39 yrs.
6. PARENTS: FATHER'S NAME Octavus Hood
   Living [ ] Deceased [X]
   If living, where
   Place of Birth Piedmont Ala.
   MOTHER'S NAME Laura Neal
   Living [X] Deceased [ ]
   If living, where CAVESPRING, GA
   Place of Birth Indianapolis Indiana

H. 979.

Third, the prosecution identified black prospective jurors Eddie Hood, Louise Wilson and Corrie Hines as "B#1," "B#2," and "B#3," respectively, in its notes.



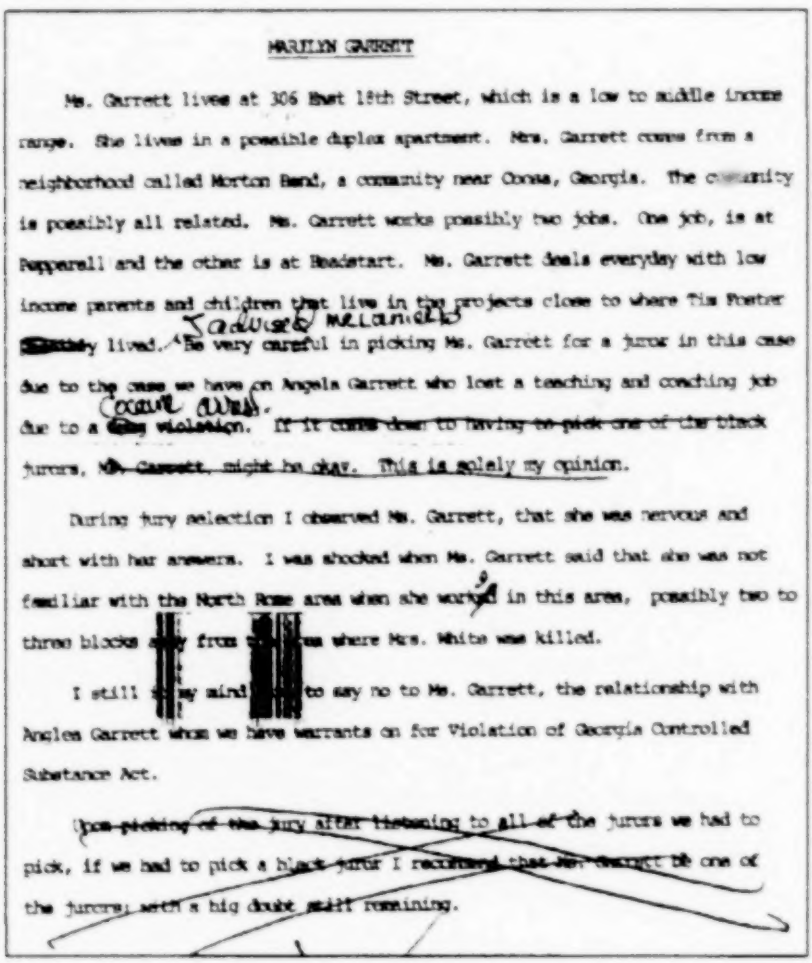
B#1 Eddie Hood

B#2 – Batson issue Louise Wilson

B#3 Corrie Hines

H. 945-47.

Fourth, Clayton Lundy, the prosecution's investigator, ranked the black prospective jurors against each other in case "it comes down to having to pick one of the black jurors." H. 995. Lundy explained in a draft affidavit that he advised the prosecutor: "if we had to pick a black juror then I recommend that [Marilyn] Garrett be one of the jurors; with a big doubt still remaining." H. 995.[8]



MARILYN GARRETT

Ms. Garrett lives at 306 East 18th Street, which is a low to middle income range. She lives in a possible duplex apartment. Mrs. Garrett comes from a neighborhood called Morton Bend, a community near Cocsa, Georgia. The community is possibly all related. Ms. Garrett works possibly two jobs. One job, is at Pepperell and the other is at Headstart. Ms. Garrett deals everyday with low income parents and children that live in the projects close to where Tim Foster lived. I advised Mr. Landis Be very careful in picking Ms. Garrett for a juror in this case due to the case we have on Angela Garrett who lost a teaching and coaching job due to a violation. Court Wish. ~~If it comes down to having to pick one of the black jurors, Ms. Garrett might be okay. This is solely my opinion.~~

During jury selection I observed Ms. Garrett, that she was nervous and short with her answers. I was shocked when Ms. Garrett said that she was not familiar with the North Rome area when she worked in this area, possibly two to three blocks away from the area where Mrs. White was killed.

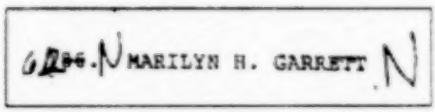
I still [redacted] my mind [redacted] to say no to Ms. Garrett, the relationship with Angela Garrett whom we have warrants on for Violation of Georgia Controlled Substance Act.

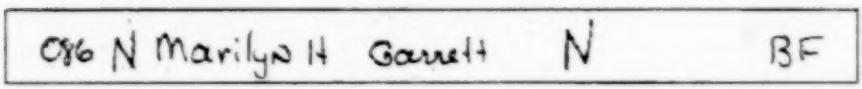
~~Upon picking of the jury after listening to all of the jurors we had to pick, if we had to pick a black juror I recommend that Mrs. Garrett be one of the jurors; with a big doubt still remaining.~~

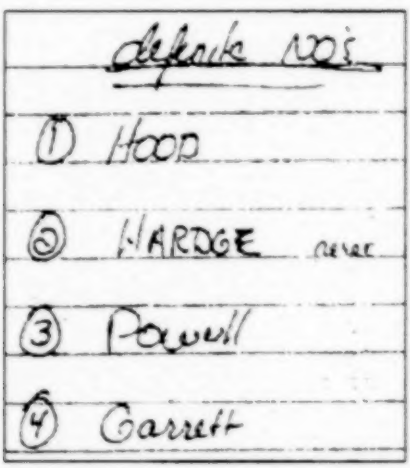
H. 995. When the prosecution submitted Lundy's final affidavit to the trial court in response to the defense's *Batson* objection, the sentences referring to the race of Garrett and the other black prospective jurors had been deleted. *See* R. 556.

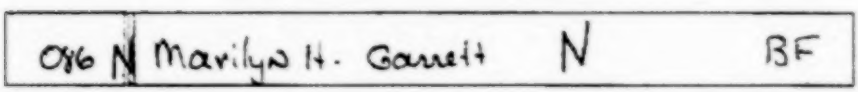
[8] The prosecutor stated expressly that he relied on Lundy's advice in striking Garrett. M.N.T. 41.

Fifth, the prosecution's strike lists contradict the "race-neutral" explanations proffered for the strikes of the black prospective jurors. For example, the prosecutor claimed that his team "had, in [its] jury notes, listed [Marilyn Garrett] as questionable," and only decided to strike her when Shirley Powell, the fifth black prospective juror, was removed for cause on the morning of jury selection. R. 438. But Garrett was identified as a "No" or "Definite No" on all four of the prosecution's strike lists. H. 939, 950, 951, 999.[7]









H. 939, 950, 951, 999.

[7] All four lists also include Powell, the prospective juror who was removed for cause shortly before the jury was struck, as a "No. H. 939, 949, 951, 998. Therefore, the prosecution clearly created the lists *before* Powell was removed for cause. The lists also identified other prospective jurors as "Questionable," H. 951, which further undermines the prosecutor's explanation regarding Garrett.

Having admitted those documents and other evidence, the state habeas court denied relief on December 9, 2013. On the *Batson* issue, the court concluded:

> The notes and records submitted by Petitioner fail to demonstrate purposeful discrimination on the basis that the race of prospective jurors was either circled, highlighted or otherwise noted on various lists. Furthermore, the State has offered evidence sufficient to rebut such a claim. The court finds that the State put forward multiple race-neutral reasons for striking each juror, and the Petitioner's claim of inherent discrimination is unfounded by the record. Importantly, this court notes that on direct appeal, trial counsel raised a claim that the trial court erred in finding that the prosecution provided race-neutral reasons for striking the four African-American jurors. The Georgia Supreme Court affirmed the trial court's denial of this claim, finding that the prosecutor's explanations were related to the case to be tried, and were clear and reasonably specific. The Georgia Supreme Court held that the trial court did not err by finding these reasons to be sufficiently neutral and legitimate. *Foster v. State*, [374 S.E.2d 188, 191-92] (1988).
>
> Accordingly, the court finds the Petitioner's renewed *Batson* claim is without merit.

Order at 17 (Butts Co. Sup. Ct. Dec. 9, 2013).

Foster sought review in the Georgia Supreme Court by filing an application for a certificate of probable cause to appeal. The court denied the application on November 3, 2014. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

"[T]he State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson v. Kentucky*, 476 U.S. 79, 85 (1986). At Foster's trial, the prosecution struck all four black prospective jurors, and its notes reflect an

explicit reliance on race in the jury selection process. In light of the ensuing death sentence, these extraordinary circumstances warrant this Court's intervention.

In *Batson*, this Court established a three-step process for addressing claims of race discrimination in the use of peremptory strikes. The defendant first must make a prima facie showing of race discrimination in the prosecution's exercise of peremptory strikes. *See Batson*, 476 U.S. at 96-98; *see also Snyder v. Louisiana*, 552 U.S. 472, 476 (2008). If that showing has been made, the process moves to the second step, at which the prosecution must offer a race-neutral explanation for the strikes in question. *Id.* at 476-77. Finally, at step three, the court must determine whether the defendant has established purposeful discrimination. *Id.* at 478.

Since the Georgia courts reached step three, the *Batson* analysis in this case hinges on whether Foster has established purposeful discrimination. The "decisive question" at the critical third step is "whether [the State's] race-neutral explanation[s] should be believed." *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 339 (2003) (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). In the consideration of that question, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478; *see Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 240 (2005) (requiring consideration of "all relevant circumstances"); *Batson*, 476 U.S. at 96 (same).

As explained below, the Georgia courts failed to give meaningful consideration to "all relevant circumstances" when reviewing Foster's *Batson* claim

in the state habeas proceedings. Consequently, they failed to recognize the race discrimination that defined the prosecution's jury selection process.

I. The Georgia Courts Failed to Give Meaningful Consideration to "All Relevant Circumstances" as *Batson* Requires.

In ruling that Foster failed to prove a *Batson* violation, the state habeas court deferred to the rulings of the original trial court, which overruled Foster's *Batson* objection, and the Georgia Supreme Court, which affirmed the trial court on direct appeal. Order at 16-17 (Butts Co. Sup. Ct. Dec. 9, 2013). However, neither of those courts had access to the prosecution's notes from jury selection, which demonstrate an explicit focus on race. By deferring to the prior rulings—which were based on a fraction of the evidence now available—the state habeas court necessarily failed to give full consideration to "all relevant circumstances" as required by *Batson*.

The state habeas court's cursory treatment of the prosecution's "race-neutral" reasons demonstrates the error in the court's analysis. The court stated: "The court finds that the State put forward multiple race-neutral reasons for striking each juror The Georgia Supreme Court affirmed the trial court's denial of this claim, finding that the prosecutor's explanations were related to the case to be tried, and were clear and reasonably specific." Order at 17 (Butts Co. Sup. Ct. Dec. 9, 2013). However, the ultimate question is not whether the prosecution's "race-neutral" reasons were related to the case and reasonably specific, but instead whether the stated reasons were the *actual reasons* for the strikes in light of all relevant

circumstances.[8] The state habeas court failed to consider the ways in which the prosecution's notes, which were unavailable to Foster at the time of the trial and direct appeal, undermine the credibility of the "race-neutral" reasons proffered for the strikes. As such, the court failed to give meaningful consideration to "all relevant circumstances."[9]

II. The Totality of the Evidence Establishes That the Prosecution Discriminated on the Basis of Race in Violation of *Batson*.

The evidence of race discrimination in this death penalty case, considered cumulatively, establishes a constitutional violation.

A. The Prosecution Struck One Hundred Percent of the Black Prospective Jurors Who Were Qualified to Serve.

The prosecution struck all four black prospective jurors qualified to serve on Foster's jury. T. 1337-43. It also planned to strike Shirley Powell, the fifth black prospective juror, H. 939, 949, 951, 998, but Powell was excused for cause on the morning of jury selection, T. 1329. The prosecution s one hundred percent strike rate for black prospective jurors stands in sharp contrast to its rate for the remainder of the venire. It struck just six of the thirty-eight nonblack prospective jurors—sixteen percent. T. 1336-44. "Happenstance is unlikely to produce this disparity." *Miller-El II*, 545 U.S. at 241.

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[8] *See Miller-El II*, 545 U.S. at 240 ("If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain* [*v. Alabama*, 380 U.S. 202 (1965), which placed a "crippling burden of proof" on defendants challenging race discrimination in jury selection, *Batson*, 476 U.S. at 92]).

[9] This Court provided an example of the interconnectedness of relevant circumstances in *Snyder*: "Here, as just one example, if there were persisting doubts as to the outcome, a court would be required to consider the strike of Ms. Scott for the bearing it might have upon the strike of Mr. Brooks." *Id.* at 478.

B. The Prosecution Focused Heavily on Race in Its Preparation for Jury Selection.

At trial, the prosecution claimed that race was "not a factor" in its jury selection process. T. 1357. Its notes prove otherwise.

In its decisions in *Miller-El*, this Court found discriminatory intent in the prosecutors' use of peremptory strikes in part because the prosecutors "marked the race of each prospective juror on their juror cards." *Miller-El II*, 545 U.S. at 264. The Court explained that the markings on the juror cards supported "[t]he supposition that race was a factor." *Miller-El I*, 537 U.S. at 347.

Here, the prosecution highlighted four different copies of the jury list, H. 903-26, circled the word "BLACK" on multiple juror questionnaires, H. 961, 967, 973, 979, 984, referred to black prospective jurors as "B#1," "B#2," and "B#3," H. 945-47, and wrote the race and gender of every prospective juror on various other lists, H. 949-50, 998-99. Like the juror cards in *Miller-El*, those documents provide a clear indication of discriminatory intent.

C. The Prosecution's Purported Reasons for Striking the Four Qualified Black Prospective Jurors Are Belied by the Evidence.

The prosecution proffered forty reasons for its peremptory strikes of the four black prospective jurors at trial—and still more reasons in response to Foster's motion for new trial. T. 1361-76; M.N.T. 40-41; R. 424-25. The sheer quantity of reasons casts suspicion on the genuineness of each individual reason. In addition, the proffering of additional reasons after the trial is a red flag for discrimination. *See Miller-El II*, 545 U.S. at 252 (stating that a prosecutor must stand or fall on his

original reasons); *id.* at 246 (criticizing a subsequently proffered reason as "reek[ing] of afterthought"). When viewed in light of the prosecution's notes and the other available evidence, the dozens of proffered reasons are simply not believable. Each of the four strikes is addressed in turn.

1. Marilyn Garrett

In the trial court, the prosecution proffered twelve reasons for its strike of Marilyn Garrett—ten in response to Foster's original objection, T. 1374-76, and two more in response to Foster's motion for new trial, R. 425; M.N.T. 41. On direct appeal, the Georgia Supreme Court focused on two purported reasons: (1) Garrett worked with underprivileged children; and (2) Garrett responded inaccurately to the question of whether she knew anyone with a drug problem because her cousin had been arrested for drug possession. *Foster*, 374 S.E.2d at 192. Given what the prosecution's notes reveal about its jury selection process, neither of those reasons is convincing.

In preparation for jury selection, Clayton Lundy, the prosecution's investigator, offered the following advice to the prosecutors: "If it comes down to having to pick one of the black jurors, Ms. Garrett might be okay." H. 995. He also stated: "[I]f we had to pick a black juror I recommend that Ms. Garrett be one of the jurors; with a big doubt still remaining." H. 995. Those comments make clear that the prosecution's preferred outcome was to secure an all-white jury. Moreover, since the prosecutor expressly based the strike of Garrett on Lundy's advice, M.N.T. 41, the comments establish a discriminatory perspective with respect to the strike.

The prosecution's notes also reveal that the explanation proffered for the strike of Garrett was fabricated. The prosecutor represented to the trial court that he did not intend to strike Garrett and only decided to do so when Shirley Powell, another black prospective juror, was excused for cause. R. 438. But Garrett was listed as a "No" on all four of the prosecution s strike lists, which were made before Powell was excused. *See* H. 939, 950, 951, 999.

Significantly, the prosecution did not ask Garrett *any* questions about *any* of the twelve reasons it ultimately proffered for striking her. T. 952-53. "[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El II*, 545 U.S. at 246.

The first reason acknowledged by the Georgia Supreme Court, that Garrett worked "with low income, underprivileged children" through her job as a teacher's aide, *Foster*, 374 S.E.2d at 192,[10] is unpersuasive given the circumstances. Beyond the fact that the prosecution had focused on Garrett's race throughout its preparations, it accepted a teacher's aide and three public school teachers who were white.[11] "If a prosecutor's proffered reason for striking a black panelist applies just

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[10] The Georgia Supreme Court erroneously referred to Garrett as a "social worker. *Foster*, 374 S.E.2d at 192. Garrett stated that she was a teacher's aide, not a social worker. T. 954 (voir dire); J.Q. 86 at *2 (questionnaire).

[11] The prosecution did not strike white prospective juror Martha Duncan, who, like Garrett, was employed as a "teacher's aide." J.Q. 88 at *2. Duncan served on Foster's jury. T. 1343-44. In addition, the prosecution chose not to strike white prospective jurors Joyce M. Nicholson, Patricia Larson Bing and Virginia Berry, all of whom were employed as teachers. J.Q. 10 at *2, (Nicholson); J.Q. 18 at *2, (Bing); J.Q. 114 at *2 (Berry). Nicholson and Bing served on the jury, T. 1337, while Berry was accepted as an alternate by the prosecution but struck by the defense, T. 1346-47.

as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination . " *Miller-El II*, 545 U.S. at 241.

The second reason, that Garrett responded inaccurately to the question of whether she knew anyone with a drug problem because her cousin had been arrested for drug possession, has no basis in the record. The prosecution did not ask Garrett whether she was in contact with her cousin, whether or what she knew about her cousin's arrest, or what she would consider to be a drug problem. Without any inquiry into those matters, there was no way of knowing whether Garrett's response was inaccurate. *See Snyder*, 552 U.S. at 479 (declining to accept a reason with no basis in the record). Also, the prosecutor did not even mention Garrett's cousin in response to the defense's original *Batson* objection. T. 1374-76. He first noted it in response to Foster's motion for new trial, M.N.T. 41; R. 425, which "reeks of afterthought," *Miller-El II*, 545 U.S. at 246.

The prosecution's additional reasons, which the Georgia Supreme Court did not acknowledge, are internally inconsistent. For example, the prosecution stated that he struck Garrett in part because she "didn't ask off [the jury] because of sequestration." T. 1375. But the same prosecutor said he struck Eddie Hood, another black prospective juror, because Hood "asked to be off the jury." T. 1362. The prosecutor also claimed he struck Garrett because she was too young, yet he accepted five white prospective jurors who were younger.[12]

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[12] *Compare* J.Q. 86 at *1 (Garrett, age 34) *with* J.Q. 4 at *1, T. 1336 (Wiley Ratliff, 24); J.Q. 70 at *1, T. 1342 (Stephen Horner, 30); J.Q. 92 at *1, T. 1344 (Mark Floyd, 21); J.Q. 106 at *1, T. 1344 (Don Huffman, 20); J.Q. 115 at *1, T. 1347 (William Howell, 31).

2. Eddie Hood

In the trial court, the prosecution provided nine reasons for the strike of Eddie Hood. T. 1361-64. The Georgia Supreme Court acknowledged five of them: (1) Hood had a son who was the same age as Foster and had been convicted of theft; (2) Hood was married to a woman who worked at Northwest Regional Hospital, which houses mentally ill patients; (3) Hood appeared reluctant to say that he could vote for the death penalty; (4) Hood belonged to the Church of Christ; and (5) Hood's brother was a drug counselor. *Foster*, 374 S.E.2d at 192. None of the five reasons holds up as genuine in light of the evidence now available.

Before jury selection even began, the prosecution identified Hood as "B#1" in its notes. H. 945. In addition, the prosecution circled four answers that Hood provided on his juror questionnaire: his race ("BLACK"), his son's age, his wife's occupation, and his religious affiliation. H. 979-81. In later justifying its peremptory strike of Hood, the prosecution cited three of the four answers it had circled on Hood's questionnaire as reasons for striking him: his son's age, T. 1361, his wife's occupation, T. 1362, and his religious affiliation, T. 1363. The only answer that the prosecution circled but did not acknowledge as a reason for its strike was Hood's race. If the prosecution had not deemed Hood's race important, it would not have circled it on the questionnaire.

As with Garrett, the prosecution did not ask Hood *any* questions about *any* of the nine reasons it proffered in support of its peremptory strike. T. 274-78. Again, "[t]he State's failure to engage in any meaningful voir dire examination on a subject

the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El II*, 545 U.S. at 246.

The first reason acknowledged by the Georgia Supreme Court was that Hood had a son Foster's age with a misdemeanor theft conviction. However, the prosecution never expressed any interest in the non-violent misdemeanors of prospective jurors' family members. Prior to trial, both the prosecution and the defense submitted proposed questionnaires to the trial court. Both proposed the question, "Do you have a close friend or relative who has been accused or convicted of a crime of violence?" R. 252 (the prosecution's proposed questionnaire), 256 (the defense's proposed questionnaire). Neither party proposed a question about non-violent misdemeanors. Nonetheless, the prosecution claimed it struck Hood because of his son's misdemeanor theft conviction. T. 1361-62. It did so even though it did not ask Hood any questions about his son's conviction during voir dire. T. 274-78.

Even apart from the misdemeanor issue, the prosecutor claimed concern over the fact that Hood's son was eighteen, the same age as Foster. T. 1361. But the prosecution accepted thirteen white prospective jurors with children between seventeen and twenty-three.[13]

The second reason acknowledged by the Georgia Supreme Court, that Hood's wife worked at Northwest Regional Hospital, is also unpersuasive. Hood's wife

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[13] *See* J.Q. 31 at *3 (Bill Graves, son, 17); J.Q. 33 at *3 (James Cochoran, two sons, 21 and 24); J.Q. 46 at *3 (Claibore Leroy, son, 23); J.Q. 72 at *3 (Margaret Hibbert, son, 20); J.Q. 88 at *3 (Martha Duncan, son, 20, daughter, 23); J.Q. 117 at *3 (Robert Summers, son, 21, daughter, 20); J.Q. 122 at *3 (Orvil Talieaferro, two sons, 24 and 22); J.Q. 20 at *3 (Myrtle Evans, daughter, 18); J.Q. 44 at *3 (Donald Hall, daughter, 23); J.Q. 64 at *3 (Elbert Robertson, daughter, 20, son, 16); J.Q. 73 at *3 (Robert Milam, daughter, 23); J.Q. 99 at *3 (Hugh Hubbard, two daughters, 24 and 22); J.Q. 111 at *3 (Nancy Cadle, daughter, 20); T. 1336-47 (the prosecution accepting those jurors).

worked in food services, J.Q. 9 at *2, and the prosecution accepted Arlene Blackmon, a white prospective juror who had worked at Northwest Regional in the kitchen and in housekeeping, J.Q. 83 at *2.

The third reason, that Hood appeared reluctant to say he could vote for the death penalty, is not supported by the record. Hood stated initially that he would automatically vote for life in prison instead of death, T. 270, but it quickly became clear that he had misunderstood the question, T. 274. The totality of his responses reflects that he was no more reluctant to impose a death sentence than several white prospective jurors whom the prosecutor accepted.[14] The prosecution's purported reliance on Hood's church affiliation is also suspicious. No one asked Hood about his church's view of the death penalty. If asked, Hood would have said, "To my knowledge, my church does not take a stand against capital punishment." R. 420 (Hood's post-trial affidavit).

Finally, with regard to Hood's brother working as a drug counselor, Hood stated that his brother worked as a drug counselor "*with* the law enforcement." T. 279 (emphasis added). If anything, that should have made Hood more appealing to the prosecution, not less so.

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[14] Initially, Hood answered affimatively when asked by the trial court whether he would "automatically vote to impose a life imprisonment sentence in a murder case." T. 270. After the court realized that Hood had misunderstood the question, it asked, "If the evidence warrants the death penalty, could you vote for the death penalty?" T. 274. Hood replied, "Yes. I could vote for the death penalty." T. 274. The voir dire examinations of Mark Floyd and Don Huffman went exactly the same way. Floyd and Huffman answered affirmatively when asked by the trial court if they would "automatically vote to impose a life imprisonment sentence in a murder case." T. 994, 1101. But it then became clear that they had misunderstood the question, and they both stated that they could vote for the death penalty if the evidence warranted it. T. 994, 1101. Another prospective juror, Mildred Hill, stated, "I am opposed to the death penalty." T. 1011. But then she was asked, "[W]hat did you mean by your answer before?" T. 1011. She replied, "I am for the death penalty." T. 1011.

3. Mary Turner

In the trial court, the prosecution provided fourteen reasons for its strike of Turner—twelve in response to Foster's original objection, T. 1369-72, and two more in response to Foster's motion for new trial, R. 425; M.N.T. 40. Of the fourteen purported reasons, the Georgia Supreme Court acknowledged two: (1) Turner stated that she was prosecution investigator Clayton Lundy's half-sister, but Lundy said she was not; (2) Turner stated on her questionnaire that she did not know anyone who had been convicted of a crime of violence, yet her brother-in-law had been convicted of burglary and drug offenses and her husband had been convicted of carrying a concealed weapon. *Foster*, 374 S.E.2d at 192.

The prosecutor relied on the advice of his investigator, Clayton Lundy, when striking Turner. *See* R. 570-71. Therefore, the strike must be evaluated in the context of Lundy's view of the jury selection process, which was that the ideal jury for Foster's trial would include only white people. *See* H. 995 ("If it comes down to having to pick one of the black jurors . . . ").

Both of the reasons noted above involved a supposed concern about Turner's "lack of candidness with the Court." R. 436. However, the prosecutors did not ask Turner about supposed inaccuracies in her statements, and they did not mention any concern about her lack of candor until it was time to justify their peremptory strikes. *See Miller-El II*, 545 U.S. at 246 (explaining that the State's failure to

question a prospective juror on an issue that becomes a reason for a strike indicates discriminatory intent).[15]

4. Evelyn Hardge

In the trial court, the prosecution provided ten reasons for its strike of Evelyn Hardge—nine in response to Foster's original objection, T. 1367-69, and one more in response to Foster's motion for new trial, R. 424. Foster conceded in his brief in support of his motion for new trial that "the prosecution had more reason to strike Evelyn Hardge than the other black prospective jurors." R. 387. This was likely because Hardge had spoken with Foster's mother outside the courtroom. T. 1367. However, the prosecution's notes, which were not available to Foster at trial, indicate that the prosecution was as racially motivated in striking Hardge as it was in striking Garrett, Hood and Turner. Lundy compared Hardge to the other black prospective jurors, H. 944, as he did with Garrett. H. 995.

Moreover, the prosecutor provided a litany of unconvincing reasons for striking Hardge. For example, he claimed he struck Hardge in part because she had a son who was twenty-three years old, which was too close to Foster's age. T.

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[15] If the prosecution had asked Turner about the questions it believed she had answered incorrectly, she would have demonstrated that the prosecution's concerns were unfounded. As Turner explained in a post-trial affidavit: "I did not state that [my brother-in-law] had a record of a crime of violence because I did not interpret burglary convictions as crimes of violence." R. 400. Given that Turner did not consider burglary to be a violent crime, she likely would not have considered carrying a concealed weapon to be a violent crime either. As for her relationship with Lundy, Turner further explained the situation regarding her parents, one of whom was Clayton Lundy's father, in her affidavit in this habeas case. H. 767-68; *see also* H. 685 (Emma Gibson stating that Turner is her daughter and that William Lundy, Clayton Lundy's father, was Turner's father).

1367. But he accepted five white prospective jurors with sons between seventeen and twenty-three, and eight others with daughters in the same age range.[16]

D. The Prosecutor's Closing Argument at the Penalty Phase Confirms His Discriminatory Intent.

Having used his peremptory strikes to obtain an all-white jury, the prosecutor stated in his closing argument at the penalty phase: "We have got to believe that . if you send somebody to death, that you deter other people out there in the projects from doing the same again." T. 2505. Black families occupied more than ninety percent of the units in the local housing projects at the time of the trial. R. 551. The prosecutor's argument would have been far more precarious—and likely would not have been made—if the jury was racially diverse. In the context of *Batson*, the prosecutor's argument provides further support for a finding of race discrimination.

CONCLUSION

This Court should grant certiorari to review the important issue of race discrimination in this death penalty case.

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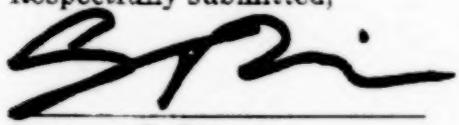
[16] *See supra* note 13 (listing the thirteen white prospective jurors with children between seventeen and twenty-three).

Respectfully submitted,



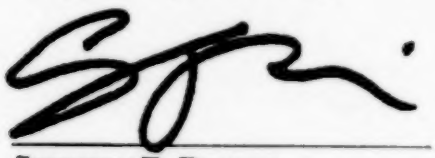
STEPHEN B. BRIGHT
Counsel of Record
PATRICK MULVANEY
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
sbright@schr.org
pmulvaney@schr.org

CERTIFICATE OF SERVICE

I, Stephen B. Bright, hereby declare that on January 30, 2015, I served this Petition for Writ of Certiorari, including the appendix, on the State of Georgia by depositing an envelope containing the petition in the United States mail, with first-class postage prepaid, addressed as follows:

Richard Tangum
Assistant Attorney General
40 Capitol Square, SW
Atlanta, GA 30334

Respectfully submitted,



STEPHEN B. BRIGHT
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
sbright@schr.org

RT

No. 14-8349

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY TYRONE FOSTER,

PETITIONER,

v.

BRUCE CHATMAN, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

SAMUEL S. OLENS
Attorney General

BETH A. BURTON
Deputy Assistant Attorney General

SABRINA D. GRAHAM
Senior Assistant Attorney General

RICHARD W. TANGUM
Assistant Attorney General
(*Counsel for Respondent*)

Please serve:
Richard W. Tangum
Assistant Attorney General
40 Capitol Square
Atlanta, Georgia 30334-1300
(404) 656-3397

QUESTION PRESENTED

1. **SHOULD THIS COURT DENY CERTIORARI TO REVIEW A FACT-SPECIFIC APPLICATION OF PETITIONER'S BATSON V. KENTUCKY CLAIM THAT IS IN ACCORDANCE WITH THIS COURT'S PRECEDENT?**

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BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT

I. STATEMENT OF THE CASE

A. TRIAL PROCEEDINGS

Petitioner Timothy Tyrone Foster was convicted by a jury in the Superior Court of Floyd County of one count of malice murder and one count of burglary on May 1, 1987. (T. 2444-2445).[1] The same day Petitioner was also sentenced to death for the malice murder of Queen Madge White. (T. 2551). In addition to the death sentence, the trial court sentenced Petitioner to twenty years for burglary. (T. 2553).

B. MOTION FOR NEW TRIAL AND DIRECT APPEAL PROCEEDINGS

Petitioner filed his motion for new trial on May 28, 1987 and it was denied on February 3, 1988. Petitioner filed a notice of appeal to the Georgia Supreme Court on March 3, 1988. The Georgia Supreme Court affirmed Petitioner's convictions and sentences on November 22, 1988 and denied reconsideration on December 14, 1988. Foster v. State, 258 Ga. 736 (1988), *cert denied* Foster v.

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[1] References to Petitioner's Application for Certificate of Probable Cause to Appeal will be denominated as "Application, __." References to the Trial Transcript will be denominated "T. Page Number." References to the Record will be denominated as "R. Page Number." References to the Motion for New Trial Hearing will be denominated as "MNT Hearing, Page Number." References to the State Habeas Transcript will be denominated as "HT, Volume, Page Number." References to the State Habeas Court's Final Order will be denominated as "HO, Page Number."

Georgia, 490 U.S. 1085 (1989), *reh'g denied* Foster v. Georgia, 492 U.S. 928 (1989).

C. INITIAL STATE HABEAS CORPUS PROCEEDING

On July 28, 1989, Petitioner filed a petition for writ of habeas corpus and subsequently filed a "First Amendment to Petition for Writ of Habeas Corpus" on April 2, 1990 wherein he alleged, *inter alia*, that he was intellectually disabled. On April 4, 1990, the state habeas court remanded Petitioner's case to the Superior Court of Floyd County for a jury trial on the issue of Petitioner's alleged intellectual disability under the procedure set forth by the Georgia Supreme Court in Fleming v. Zant, 259 Ga. 687 (1989). Petitioner's habeas corpus proceedings were held in abeyance pending the intellectual disability trial.

D. REMAND TO TRIAL COURT ON INTELLECTUAL DISABILITY CLAIM

Following pretrial proceedings and an interlocutory appeal to the Georgia Supreme Court which resulted in the decision Zant v. Foster, 261 Ga. 450 (1991), Petitioner's intellectual disability claim proceeded to a civil jury trial from March 15, 1999 to March 18, 1999. Following the presentation of evidence by both the State and Petitioner, the jury returned a verdict finding that Petitioner was not intellectually disabled. Petitioner thereafter filed a motion for new trial and an amendment thereto, which were denied in an order filed July 9, 1999.

E. DIRECT APPEAL REGARDING INTELLECTUALLY DISABILITY CLAIM

The Georgia Supreme Court affirmed the jury's finding that Petitioner was not intellectually disabled on January 18, 2000. Foster v. State, 272 Ga. 69 (2000), *cert denied* Foster v. Georgia, 531 U.S. 890 (2000), *reh'g denied*, Foster v. Georgia, 531 U.S. 1045 (2000).

F. STATE HABEAS PROCEEDINGS

Petitioner filed his petition for writ of habeas corpus on January 4, 2002 and amended petitions on January 26, 2004 and July 10, 2006. An evidentiary hearing was held on October 30-31, 2006.

The state habeas corpus court denied Petitioner's state habeas petition in an order filed December 9, 2013. Petitioner filed his application for certificate of probable cause to appeal on February 10, 2014. Petitioner's application for a certificate of probable cause to appeal was denied by the Georgia Supreme Court on November 3, 2014.

II. STATEMENT OF THE FACTS

On direct appeal, the Georgia Supreme Court found the evidence at trial established the following:

> Queen Madge White, a 79-year-old widow, lived by herself in Rome, Georgia. Early in the evening of August 27, 1986, a friend took White to choir practice, and brought her home at 8:30 p.m. White talked to her sister by telephone at 9:00 p.m. and everything was normal. However, when the sister stopped by early the next morning, she

> discovered that White's house had been broken into and ransacked. The sister called the police, who found White's body lying on the floor in her bedroom covered to her chin by a blanket. Her face was coated with talcum powder. Her jaw was broken. She had a severe gash on the top of her head. She had been sexually molested with a salad-dressing bottle, and strangled to death. A number of her possessions were missing from her home.
>
> The appellant, Timothy Tyrone Foster, was arrested for White's murder a month later when he threatened his live-in companion and she responded by turning him in. The victim's possessions were recovered from their home and from Foster's two sisters. Foster was interrogated and confessed

Foster v. State, 258 Ga. at 736 (Direct Appeal I).

III. REASONS FOR NOT GRANTING THE WRIT

A. CERTIORARI REVIEW SHOULD BE DENIED AS THE STATE COURTS' FINDINGS REGARDING PETITIONER'S BATSON V. KENTUCKY CLAIM WERE A FACT SPECIFIC APPLICATION IN ACCORDANCE WITH THIS COURT'S PRECEDENT.

During the voir dire portion of Petitioner's initial trial, forty two (42) jurors were qualified by the trial court to serve. (T. 1336-1344, 1354). Jury selection took place Monday April 27, 1987, following the completion of questioning the previous Friday. (R. 565). This allowed Petitioner's trial counsel and State prosecutors Stephen Lanier and Doug Pullen to spend the weekend assessing prospective jurors. (R. 565). Mr. Lanier and Mr. Pullen were assisted in their investigation by Clayton Lundy. (MNT Hearing, p. 16). Of the jurors qualified by the trial court to serve, four were black: Eddie Hood, Evelyn Hardge, Mary Turner and Marilyn Garrett. Mr. Lanier and Mr. Pullen utilized a portion of their

peremptory strikes to excuse all four. (T. 1337-1343). Trial counsel objected to the strikes, alleging the State violated this Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986), which prohibits juror excusal on the basis of race. (T. 1354). The trial court conducted a Batson analysis and found that Petitioner had failed in his burden of demonstrating purposeful discrimination. (T. 1361, 1380). During the motion for new trial, the trial court reconsidered Petitioner's Batson claim and again found Petitioner had failed to show the strikes were racially motivated. (R. 567-573). On appeal, the Georgia Supreme Court held the trial court finding that Petitioner had failed to demonstrate purposeful discrimination was "entitled to "great deference," and...not clearly erroneous." Foster, 258 Ga. at 739 (Direct Appeal I). During state habeas proceedings, Petitioner tendered the State's file from trial including lists of prospective jurors and notes from voir dire. (HT Vol. 4, pp. 896-1000). Considering the entirety of the habeas record, the state habeas court rejected Petitioner's Batson claim. (HO, p. 17).

Petitioner presently alleges the prosecution engaged in racial discrimination during jury selection by striking the four black prospective jurors and that the state habeas court failed to undertake meaningful consideration of the entirety of the evidence. (Petitioner's brief, pp. 9-10). Contrary to Petitioner's claim, the state habeas court found that despite the newly tendered evidence, Petitioner failed to demonstrate the strikes were inherently discriminatory as the State had thoroughly

investigated all prospective jurors in advance of trial and had numerous credible race neutral reasons for striking Mr. Hood, Ms. Hardge, Ms. Turner, and Ms. Garrett. (HO, p. 17). This Court should not grant certiorari in this case as this is a fact-specific application of Batson and this Court does not sit to determine facts. Even if it did, Petitioner has failed to show the state courts erroneously decided the facts.

This Court detailed the steps of a Batson analysis in Snyder v. Louisiana:

> *Batson* provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race:
>
> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[;s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

552 U.S. 472, 476 (2008) (citing Miller-El v. Dretke, 545 U.S. 231, 277 (2005)).

Regarding the third step in the analysis, this Court held:

> The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge," *Hernandez*, 500 U.S., at 365, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (plurality opinion). In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's firsthand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to

> the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "'peculiarly within a trial judge's province,'" *ibid.* (quoting *Wainwright* v. *Witt,* 469 U.S. 412, 428, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)), and we have stated that "in the absence of exceptional circumstances, we would defer to [the trial court]," 500 U.S., at 366, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (plurality opinion).

Snyder, 552 U.S. at 477 (citation omitted).

It is undisputed that Petitioner's claim reached the third step of the Batson analysis in the trial court. In state habeas proceedings the analysis again focused upon the third step, that of prosecutorial intent, in light of alleged "new" evidence tendered by Petitioner. Specifically, Petitioner references the State's notes and records from jury selection in which specific jurors had been highlighted and or identified by race and gender. (Petitioner's brief, p. 11; HO, p. 15; Application, pp. 2-3). In evaluating whether the prosecution's race-neutral reasons were a pretext for purposeful discrimination, the state habeas court properly recognized that "[a]t the final stage of a Batson inquiry [as here], the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (HO, p. 15). In rejecting Petitioner's Batson claim after considering the newly tendered evidence, the state habeas court found "the record is clear that all jurors in this case, regardless of race, were thoroughly investigated and considered before the State exercised its peremptory challenges." (HO, p. 17).

Petitioner alleges "the Georgia courts failed to give meaningful consideration to "all relevant circumstances" when reviewing [Petitioner]'s Batson claim in the state habeas proceedings." (Petitioner's brief, pp. 10-11). However, the record demonstrates that in accordance with this Court's decisions applying Batson in both Miller-El, 545 U.S. at 239 and Snyder, 552 U.S. at 478, "all of the circumstances that bear upon the issue of racial animosity were consulted," by the state habeas court prior to rejecting Petitioner's claim that the strikes were motivated by race:

> There were four copies of the traverse jury list from the Petitioner's trial, and each noted that "[Green Highlighting] Represents Blacks." The prosecution or its investigators made written notations of the race of each individual prospective juror on its "qualified" juror list.
>
> District Attorney Stephen Lanier and Assistant District Attorney Doug Pullen have both stated that they exercised their peremptory challenges for entirely race-neutral reasons, and that they did not rely upon the highlighted jury lists to make their decision on how to utilize strikes. Furthermore, both the trial court and the Georgia Supreme Court conducted lengthy examinations of the Petitioner's initial Batson claims and found no error. **This court cannot find that the highlighting of the names of black jurors and the notation of their race can serve to override this previous consideration, especially where the race of each juror was noted**. While Miller-El v. Dretke, 545 U.S. 231 (2005) and Adkins v. Warden, Holman CF, 710 F.3d 1241 (2013) are cited by the Petitioner in support of his claim of purposeful discrimination, as both cases included the fact that prosecutors also marked the race of each prospective juror on their juror cards. This court finds Miller-[El] and Adkins to be distinguishable from the circumstances of this case, as the prosecution here has rebutted the purported evidence of discriminatory intent. The court finds the record evidence shows that every

prospective juror, regardless of race, was thoroughly investigated and considered by the prosecution before the exercise of its peremptory challenges.

(HO, pp. 15-16) (emphasis added) (citations omitted).

Moreover, the state habeas court elaborated on additional evidence within the record countering Petitioner's claim of racial bias by the State in jury selection:

> At the Petitioner's Motion for New Trial, while under oath as a witness called by Petitioner, District Attorney Stephen Lanier explained that he [was] assisted in jury selection at trial by Assistant District Attorney Doug Pullen and Chief Investigator Clayton Lundy. Mr. Lanier testified that over the weekend between April 24 and April 27, 1987, he, Mr. Pullen, and Mr. Lundy decided on the ten people they felt would be unfavorable jurors. Concurrent with the Petitioner's Motion for New Trial, the State also filed an Affidavit of Mr. Lundy, who testified that "having worked with and knowing Mr. Pullen and Mr. Lanier, each of us knowing the seriousness and penalty of this crime, can honestly state that the strikes used by Mr. Pullen and Mr. Lanier were not racially biased." Mr. Lundy, himself African American, testified that prior to working as chief investigator in the instant case he had served approximately eight years as a police officer patrolling various neighborhoods in the Rome area. He explained that specifics on African American jurors within the notes and records of the prosecutor were likely information he knew from having lived in Rome all his life, and that he knew many people and could "just come off the top of my head with it."
>
> It is further clear that multiple staff members within the office of the district attorney including secretaries, investigators and other assistant district attorneys would take part in adding their personal knowledge to the lists of prospective jurors. Mr. Lundy testified that 10 to 12 different individuals would go through the list, make marks and notations and add "little stuff on [prospective jurors] that we know about each." The motivation for the passing lists and notes on individual jurors was to help pick a fair jury, especially given that this was a death penalty case.

(HO, pp. 16-17) (citations omitted). The extensive investigation of all prospective jurors by the State regardless of race is clearly reflected within the record.

Mr. Lundy testified that it was common practice in cases to investigate the backgrounds of all prospective jurors. (HT Vol. 2, p. 217). Mr. Lundy also testified that specifically in this case, everyone on the traverse jury list was investigated and none were singled out, regardless of any highlighting, Lundy stating "We did extensive background check[s] on everybody." (HT Vol. 2, pp. 218-219, 221). During the hearing on Petitioner's Motion for New Trial, Mr. Lanier corroborated Mr. Lundy's testimony:

> Mr. Wyatt: My question is: Did Clayton Lundy or anybody else do a background check on the white jurors prior to jury selection?
>
> Mr. Lanier: Yes.
>
> Mr. Wyatt: And was the background check as extensive as the background check on these black jurors?
>
> Mr. Lanier: Yes.

(MNT Hearing, p. 52). From the testimony, it is evident jurors were struck due to findings from the State's extensive investigation rather than race.

Furthermore, as found by the Georgia Supreme Court and the state habeas court, the State put forth "multiple race-neutral reasons for striking each juror." (HO, p. 17). Moreover, the Georgia Supreme Court found:

The prosecutor's explanations were related to the case to be tried, and

> were clear and reasonably specific. The trial court did not err by finding them to be sufficiently neutral and legitimate. The court's determination that the prosecutor successfully rebutted the prima facie case is entitled to "great deference," Batson supra, 106 S. Ct. at 1724 (fn.21) and is not clearly erroneous in this case.

Foster, 258 Ga. at 739 (Direct Appeal I). The record provides ample support for the state courts' proper determination that Petitioner has failed in his burden to establish purposeful discrimination by the State in striking the four jurors.

1. The State Court's Decision That The Prosecution's Strikes Were Not Discriminatory Is In Accord With This Court's Precedent.

In making his claim that the state courts failed to "give meaningful consideration to 'all relevant circumstances,'" Petitioner relies in part upon the prosecution's notes taken during voir dire which included highlighted lists of prospective jurors. (Petitioner's brief, pp. 10-11, 13). However, as properly found by the state habeas court, the notes and records submitted by Petitioner failed to demonstrate purposeful discrimination on the sole basis that the race of prospective jurors were circled, highlighted or otherwise noted. (HO, p. 17). Petitioner has offered no evidence demonstrating that the intent of the State was to dismiss prospective jurors on account of their race.

Moreover, Petitioner's reference to an alleged notation by Mr. Lundy is taken out of context. Petitioner cites to Mr. Lundy's alleged statement that "[i]f it comes down to having to pick one of the black jurors, Ms. Garrett, might be okay" as evidence of purposeful discrimination by the State. However, Petitioner's fails

to note that Mr. Lundy qualified the alleged statement as "solely my opinion." (HT Vol. 4, p. 995). Though Mr. Lundy informed the State's investigation of prospective jurors, Mr. Lundy's alleged statements are not those of the State and contrary to Petitioner's claims, do not establish the State's intent. Furthermore, regarding his concerns of Ms Garrett as a potential juror, Mr. Lundy also stated "Be very careful in picking Ms. Garrett for a juror in this case due to the case we have on Angela Garrett who lost a teaching and coaching job due to a cocaine arrest." (HT Vol. 4, p. 995).

Additionally, Mr. Lanier and Mr. Pullen testified by affidavit in state habeas proceedings that it was common practice in the office to highlight in yellow those jurors who had prior case experience but neither made nor instructed others to make the green highlighted marks denoting black prospective jurors. (HT Vol. 47, pp. 14230, 14258-14259). As previously stated, both Mr. Lanier and Mr. Pullen reaffirmed that their reasoning for exercising the challenges was entirely race neutral and they did not rely on the highlighted jury lists in making their decisions on how to utilize strikes. (HT Vol. 47, pp. 14231, 14259).

As found by the state habeas court, Petitioner's continued reliance upon the presence of marked juror cards in Miller-El, 545 U.S. 231, as authority supportive of negating prosecutorial credibility is misplaced. In Miller-El, this Court found "the [juror] strikes correlate with no fact as well as they correlate with race, and

they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State." 545 U.S. at 266. In this case, it is clear that the trial court conducted a proper Batson analysis, found Petitioner has established a *prima facie* showing of discrimination and then conducted a proper review of whether the prosecutor's reasons were race neutral. Petitioner's alleged new "evidence" fails to undermine the credibility of the State in its race neutral explanations for the challenges. This is a fact-specific application of Batson and this Court does not sit to determine facts. Even if it did, Petitioner has failed to show the state courts erroneously decided the facts.

2. The State's Race-Neutral Reasoning For Exercising Strikes

Petitioner alleges the reasons given by the State in striking jurors Eddie Hood, Evelyn Hardge, Mary Turner and Marilyn Garrett are "simply not believable in light of the prosecution's notes and the other available evidence." (Petitioner's brief, p. 14). As previously stated, this Court found in Snyder, 552 U.S. at 477, that "determinations of credibility" are uniquely "within a trial judge's province," and that absent a showing of "exceptional circumstances," this Court defers to the trial court's credibility findings. Also as previously stated, this Court has found "that the best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor." Thaler v. Haynes, 559 U.S. 43, 49 (2010) (citing Hernandez v. New York, 500 U.S. 352, 365 (1991)). It is clear that the trial court carefully

considered the State's reasons for striking the four jurors following Petitioner's Batson challenge in thorough questioning of the State both at trial and during the hearing on the motion for new trial and found the reasoning race neutral.

a. Eddie Hood

Citing this Court's decision in Miller-El , Petitioner alleges the State's reasoning for striking prospective juror Eddie Hood was a pretext for discrimination as the State failed to extensively question Mr. Hood during voir dire on the issues the State later claimed for striking him. (Petitioner's brief, pp. 17-18). Petitioner also alleges one of the reasons put forth by the State for excusing Mr. Hood is invalid as white jurors with the same circumstances were not struck. Contrary to Petitioner's claims, the record shows the State conducted an extensive investigation of all prospective jurors prior to voir dire, thus limiting the need for further questioning. Moreover, a review of facts clearly show Mr. Hood distinguishable from alleged similarly situated white jurors and that the trial court properly found the State's reasoning regarding its strike of Mr. Hood race neutral. Therefore the State's excusal of Mr. Hood did not violate Batson.

Following Petitioner's Batson challenge at trial, the State opined prospective juror Eddie Hood was what the State was seeking in a juror in terms of age, employment and marriage. (T. 1361). However, one of the main reasons the State struck Mr. Hood stemmed from Mr. Hood having a son approximately the same

age as the defendant who had been convicted and sentenced approximately four years prior to the trial for theft by taking. (T. 1361). As Mr. Lanier testified at trial and during hearing on the motion for new trial:

> [I]n the two hundred and some odd jury trials that I have tried and the now five death penalties that I have tried, we stay—I stay away from jurors with family members who are, you know, criminally connected in some way or another...

(MNT Hearing, p. 40).

> It is ironic that his son...Darrell Hood has been sentenced by my court, by the Court here, to theft by taking on April 4, 1982...That is Darrell Hood who resides at 13 Copeland Street, his same address. And [Eddie Hood] does say on his questionnaire that he has three boys ages 26, 22 and 18. There is a Darell Hood that we have a conviction on that resides at that address, 13 Copeland Street, who was sentenced on April 12, 1982, twelve months suspended sentence for theft by taking. Again, theft by taking is basically the same thing that this defendant is charged with.

(T. 1362). Federal courts have found the conviction of a relative a justified race neutral reason for excusal. United States v. Vaccaro, 816 F.2d 443 (9th Cir. 1987).

At trial, Mr. Lanier also stated Mr. Hood was challenged because: Mr. Hood's wife was employed at Northwest Regional Hospital (which serves mentally ill patients) and the State readily excused those employed there where insanity was raised as a defense; Mr. Hood himself asked to be excused from the jury; Mr. Hood appeared confused and was slow to respond to death penalty questions; Mr. Hood made no eye contact with the State and his answers were ambiguous, and; Mr.

Hood's church's stance on the death penalty. (T. 1362-1363). As Mr. Lanier explained:

> One of the things that concerned me, Your Honor, is religious preference of jurors. His religious preference is Church of Christ. There have been four other jurors that have been excused for cause by agreement that belong to the Church of Christ, Juror No. 35, 53 and 78.
>
> Evidently, the question was not asked of him whether or not his church took a stand against the death penalty. He did not respond to that. His church took a stand against alcohol. But it is my experience that the Church of Christ definitely takes a stand against the death penalty.

(T. 1363). Moreover, as stated *supra,* where a juror's demeanor is invoked by the prosecution as reasoning for the strike as in this case, the trial court's "firsthand observation [is] of even greater importance." Snyder, 552 U.S. at 477.

Petitioner also alleges the State's reasoning that they struck Mr. Hood because he had a son the same age as Petitioner is a pretext for racial discrimination as the State accepted "thirteen white prospective jurors with children between seventeen and twenty-three." (Petitioner's brief, p. 18). However, the record clearly shows this claim was raised by Petitioner during the motion for new trial and the trial court found Mr. Hood's circumstances clearly distinguishable from those of white jurors:

> While the defense asserts that the state used different standards for the white jurors, insofar as many of them had children near the age of the Defendant, the Court believes that the conviction is a distinction that makes the difference. (Venireman Martha Duncan, number 88, the

> state failed to strike despite her nephew's conviction of armed robbery. The defense argues that this shows shifting standards, however, the Court must disagree. A person's feelings for a son are ordinarily much stronger than for a nephew; one's interest in a person living under one's own roof is ordinarily much stronger than one's interest in someone living in another town.)

(R. 567-568). It is clear Mr. Hood was distinguishable from the white jurors who were accepted as his son who was the same age as the Petitioner also had a conviction.

The multiple race neutral reasons offered by the State prompted the trial court, the Georgia Supreme Court and the state habeas court to find the State's explanation for its dismissal of Mr. Hood race neutral and not inherently discriminatory. (T. 1366).

b. <u>Evelyn Hardge</u>

Petitioner alleges the State's notes show the State was as motivated to strike Evelyn Hardge due to her race as the other black jurors. (Petitioner's brief, p. 21). Contrary to Petitioner's claim, the record shows trial counsel has consistently conceded the State provided race neutral reasoning to strike Ms. Hardge. Specifically, Ms. Hardge's interaction with Petitioner's mother shortly before the trial started and her obvious confusion during voir dire. Therefore, the state courts properly found the strike was not racially motivated.

The State explained that its dismissal of Ms. Hardge was largely based upon her admission to the court that just prior to her voir dire questioning she had

spoken to Petitioner's mother outside the courtroom. (T. 1367). The State also asserted that Ms. Hardge appeared confused, was very easily swayed, irrational, bewildered, and incoherent as she had stated she would vote for life regardless of the evidence, then claimed she was against the death penalty but could vote for it. (T. 1368). At trial, Petitioner's trial counsel had no response to the State's race neutral justification for striking Ms. Hardge. (T. 1369). The trial court found "the State had ample reason to excuse her." (T. 1369). During the motion for new trial, trial counsel reiterated he had no response to the State's strike of Ms. Hardge. (R. 387).

Additionally, the following colloquy during the hearing on the motion for new trial clearly demonstrates the trial court had a vivid recollection of Ms. Hardge's voir dire testimony in determining that the State's strike was race neutral:

> Mr. Lanier: Your Honor, and for the record [Petitioner] conceded that striking Evelyn Hardge was not a factor—he conceded on the record that he was not contesting the striking of Mrs. Hardge. So, obviously,--
>
> The Court: Well the Court remembers in great detail Evelyn Hardge. I don't think either side would have wanted Evelyn Hardge.

(MNT Hearing, pp. 63-64). It is clear from the record that the trial court carefully considered the entirety of the evidence and found the State had ample race neutral reasons to excuse Ms. Hardge. Petitioner has failed to show otherwise.

c. Mary Turner

Petitioner claims the state courts failed to give meaningful consideration to alleged evidence that the prosecutor relied upon his investigator Mr. Lundy in striking prospective juror Mary Turner. (Petitioner's brief, p. 20). Petitioner alleges that as a result of the prosecutor's reliance upon Mr. Lundy, the "strike must be evaluated in the context of Lundy's view of the jury selection process." (Petitioner's brief, p. 20). Contrary to Petitioner's claim, such a narrow analysis would constitute an incorrect application of Batson. As found by this Court, a court applying Batson must decide whether neutral explanations offered by the prosecution are credible and whether the "defendant has established purposeful discrimination." Miller-El, 545 U.S. at 239. As the Petitioner has conceded, and this Court has found, the entirety of the "circumstances that bear upon the issue of racial animosity must be consulted." Snyder, 552 U.S. at 478. A review of the record supports the state courts' findings that the strike of Ms. Turner was not racially motivated.

Consistent with the race neutral reasoning for excusing Mr. Hood, the State explained that it had dismissed prospective juror Ms. Turner because her half brother had been charged on five to seven separate occasions with theft, burglary and drug possession, facts not acknowledged by Ms. Turner in answering her juror

questionnaire. (T. 1369-1371). As the trial court found in denying Petitioner's motion for new trial based upon this claim:

> The district attorney stated that the prospective juror had a step-brother, Mr. Otis Turner, who had a criminal history. In her affidavit submitted by the defense as Exhibit A to its "Argument" in support of the motion for a new trial, she states that Mr. Turner is her brother-in-law, and that she did not list the charges against him because she "did not interpret burglary convictions as crimes of violence." The state, in its "Brief in Response to Defendant's Batson Argument for a New Trial," attached an Exhibit B which shows that in May of 1986 Mr. Turner was indicted for aggravated assault (with a baseball bat) and burglary. In September of 1986, a nolle prosequi was entered on this indictment. In addition, the investigator knew that her husband also had a criminal history, and she did not mention him, either. In light of these facts, the investigator did not believe she could be a fair and impartial juror in this case. Under these circumstances, the Court finds credible the state's unease with this venireman.

(R. 571-572). Given Ms. Turner's failure to disclose family members with indictments for violent crimes, the record clearly demonstrates the State's explanation for Ms. Turner's excusal was both race neutral and credible.

The State also explained that: Ms. Turner was employed by Northwest Georgia Regional Hospital which the State disfavored in light of the probable insanity defense, and; Ms. Turner hesitated strongly when answering the death penalty question and appeared confused at times and had to have questions repeated. (T. 1370-1372). In addition to his concerns regarding Ms. Turner's

candor,[2] the State asserted that Ms. Turner failed to make any eye contact with State's counsel during questioning, but rather made constant eye contact with Petitioner. (T. 1371). Federal courts have found failure to maintain eye contact during questioning constitutes sufficient race neutral reasoning justifying excusal. U.S. v. Cartlidge, 808 F 2d 1064, 1070-1071 (5th Cir. 1987). Moreover, as the Fifth Circuit Court of Appeals found a race neutral reason for a prospective juror's excusal in U.S. v. Forbes, 816 F. 2d 1006, 1009 (5th Cir. 1987), the State in the instant case noted that Ms. Turner appeared hostile to State questioning and became defensive. (T. 1371). Given the multiple race neutral reasons put forward by the State, the state courts properly concluded that Petitioner had failed to show inherent discrimination in her excusal.

d. Marilyn Garrett

Petitioner alleges racial discrimination was inherent in the excusal of prospective juror Marilyn Garrett. Specifically, Petitioner claims the State's primary reason in striking Ms. Garrett was unpersuasive as the State accepted a teacher's aide and three public school teachers who were white. (Petitioner's brief, p. 15). Contrary to Petitioner's claim, it is clear that Ms. Garrett's affiliation with the Head Start program was the basis for exercising the strike, not that she was a

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[2] Ms. Turner also represented to the trial court that she was the half-sister of Mr. Lundy, a claim which Mr. Lundy denied in his affidavit testimony. (R. 556). The trial court found that as Mr. Lundy assisted prosecutors in the case, the "friction" resulting from the dispute would not have been conducive to the State. (R. 572).

teacher's aide. Petitioner has provided no evidence that white jurors who were not struck were affiliated with Head Start. Moreover, as the record shows, this was just one of several race neutral reasons the State presented which justified Ms. Garrett's excusal. Accordingly, Petitioner has failed to demonstrate the State's strike was discriminatory.

The State explained to the trial court that Ms. Garrett's excusal stemmed from multiple reasons, all of which negated an inference of purposeful discrimination. As previously stated, the main reason given by the State was that Ms. Garrett worked with the Head Start program which served youth from low income families and Petitioner's underprivileged childhood was a central issue in the defense strategy. (T. 1375; MNT Hearing, p. 30). As the trial court found:

> The state indicated that it was "bothered" by her association with Head Start because that program deals with "low-income, underprivileged" children (Trial Transcript at 1375). As the defense counsel informed the Court before voir dire, they were trying to find jurors who possessed some empathy, or could possess some empathy, for the "socially, culturally and educationally deprived life-style" of the Defendant (Trial Transcript at 85-89). Given this, the prosecutor's strike was sound.

(R. 573). The State elaborated on its aversion to prospective jurors involved in social work:

> Mr. Pullen: [H]ave you read literature by other prosecutors on how to select jurors?
>
> Mr. Lanier: I have.

Mr. Pullen: What is the attitude that they universally have toward social workers?

Mr. Lanier: Stay away from them. As I stated in my affidavit, social workers tend to relate to people and tend to sympathize with an underdog, and the defendant in this case, knowing the facts up front, what the defenses were and knowing the social-economic condition of the defendant, you know, I wanted to stay away from any social worker.

(MNT Hearing, p. 38). The record clearly shows that State's primary reason for excusing Ms. Garrett was race neutral and that the trial court found the reason credible. Petitioner faults the trial court's analysis, claiming Ms. Garrett's employment as a teacher's aide was similar to an accepted white juror employed as a teacher's aide and three white jurors who were public school teachers. (Petitioner 's brief, p. 15). However, the trial court clearly found Ms. Garrett distinguishable from allegedly similarly situated white jurors given her involvement in the Head Start Program. (R. 573). Petitioner has failed to show the white jurors accepted had a similar affiliation.

The State also put forth reasons surrounding Ms. Garrett's demeanor. As previously addressed, where the prospective juror's demeanor is used as reasoning for excusal, great deference is given to the observations of the trial court. Snyder, 552 U.S. at 477. Notably, and affirmed as race neutral by the Fifth Circuit in Cartlidge, *supra*, the State explained Ms. Garrett would not look at the trial court but instead stayed focused on the ground during voir dire. (T.1374). Consistent

with the Court's finding of race neutral reasoning in U.S. v. Matthews, 803 F.2d 325,331(1986), the State noted that Ms. Garrett "show[ed] a complete disrespect for the Court and its authority," when responding to questions put forth by the trial court. (T. 1374). As evidenced below, the trial court agreed that the "body language" of a prospective juror is an important factor when considering excusal:

> As the defense has related in its brief, Mr. Hood was said to have no eye contact, Mrs. Garrett looked at the ground, and Mrs. Turner kept eye contact with the Defendant. The defense states that the prosecution has failed to explain the correct way for a venireman to look, and speculate that all that is left is looking at the ceiling. This hyperbole fails to note the obvious: looking at the state's attorneys would be the "correct" way. The defense has insisted that "body language" is important in the selection of a jury (Trial Transcript at 107), and the Court must agree; further, it is just as important to the state as the defense, and the Court rules on that basis.

(R. 572).

Moreover, as with Mr. Hood, the State noted its concern regarding Ms. Garrett's connection to first cousin Angela Garrett who had been was arrested shortly prior to jury selection for cocaine possession and had subsequently lost her coaching and teaching job at a local school. (MNT Hearing, p. 41). The trial court took note of the concern in its summary of the race neutral reasons justifying the excusal. (R. 573). As shown, the State offered several race neutral reasons for the excusal of Ms. Garrett including her connection to Head Start and her demeanor during voir dire, all of which the trial court found credible. Accordingly, Petitioner has failed to demonstrate the State's strike of Ms. Garrett was racially motivated.

The record is clear that the trial court, the Georgia Supreme Court and the state habeas court all conducted a thorough and meaningful review of the evidence before ruling the State's strikes of prospective jurors Eddie Hood, Evelyn Hardge, Mary Turner and Marilyn Garrett were not racially motivated. As shown above, all three state courts properly applied Batson and found the State's racially neutral reasons for striking the four jurors to be credible. Moreover, after having reviewed Petitioner's evidence which was not available to the trial court, namely the notes and files of the State, the state habeas court properly found the evidence failed to undermine the trial court's and Georgia Supreme Court's determination that the juror strikes were not racially motivated.

Petitioner's *Batson* claim has been reviewed four separates times: by the trial court immediately following voir dire; by the trial court again during the motion for new trial, by the Georgia Supreme on direct appeal, and; by the state habeas court. On all four occasions, the state courts have reviewed the facts and found Petitioner failed in his burden to show purposeful discrimination in the jurors excusals. As previously stated, this court does not sit to determine facts. Even if it did, Petitioner has clearly failed to show the multiple state courts reviewing the claim erroneously decided the facts. Therefore, the fact-specific applications of Petitioner's Batson claim fail to present a claim worthy of this Court's certiorari jurisdiction.

CONCLUSION

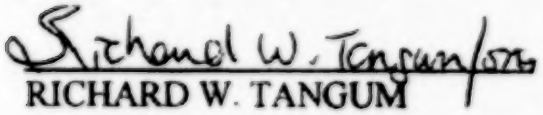
WHEREFORE, for all the above and forgoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for writ of certiorari seeking review of the judgment of the Georgia Supreme Court.

Respectfully submitted,

SAMUEL S. OLENS 551540
Attorney General

BETH A. BURTON 027500
Senior Assistant Attorney General

SABRINA D. GRAHAM 305755
Senior Assistant Attorney General



RICHARD W. TANGUM 141337
Assistant Attorney General

Please serve:

Richard W. Tangum
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-3397
Facsimile: (404) 651-6459

COMPLIANCE WITH PAGE LIMITATIONS

This brief complies with Rule 33.2 of this Court.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day electronically filed the within and foregoing with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record and also, by depositing a copy thereof, postage prepaid, in the United States mail, properly addressed, upon:

Stephen B. Bright
Patrick Mulvaney
Southern Center for Human Rights
83 Poplar Street, N.W.
Atlanta, GA 30303

This 9th day of March, 2015.

Richard W. Tangum /sdw

RICHARD W. TANGUM
Assistant Attorney General

No. 14-8349

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY TYRONE FOSTER,
Petitioner,

v.

BRUCE CHATMAN, WARDEN,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Georgia

REPLY TO GEORGIA'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN B. BRIGHT
Counsel of Record
PATRICK MULVANEY
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
sbright@schr.org
pmulvaney@schr.org

March 24, 2015

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REPLY TO GEORGIA'S OPPOSITION TO CERTIORARI

This is an extraordinary case in which Georgia is seeking to execute Timothy Tyrone Foster, a black man convicted of killing a white woman, despite direct and overwhelming evidence that the prosecution discriminated on the basis of race to secure an all-white jury at his capital trial.[1]

Georgia claims that Foster has presented "no evidence" of discriminatory intent under *Batson v. Kentucky*, 476 U.S. 79 (1986). Georgia's Br. at 11. As an initial matter, the prosecution struck all four black prospective jurors, T. 1337-43, proffered an absurd number of "race-neutral" reasons for the four strikes, most of which it never addressed in voir dire, T. 1361-76,[2] and argued for a death sentence to "deter other people out there in the projects," T. 2505.[3] More importantly, in the habeas proceedings below, Foster presented the prosecution's notes from jury selection, which reflect an explicit reliance on race in the jury selection process. Foster's petition for certiorari contains images and explanations of the prosecution's notes. *See* Petition at 5-8.

Georgia declines to acknowledge many of the notes at issue. It makes no attempt to explain the juror questionnaires on which the prosecution circled the

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[1] In the Georgia Supreme Court, this case was referred to as *Timothy Tyrone Foster v. Carl Humphrey, Warden*. Petitioner Foster referred to the case the same way in his petition for certiorari in this Court. In its brief in opposition to certiorari, Georgia lists Bruce Chatman, Warden, as the respondent because Chatman has replaced Carl Humphrey as the warden of the Georgia Diagnostic and Classification Prison. *See* Sup. Ct. R. 35(3) (providing for substitution of parties in these circumstances). Foster does the same in this reply.

[2] *See Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 246 (2005) ("The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.").

[3] As noted in Foster's petition for certiorari, black families occupied more than ninety percent of the units in the local housing projects at the time of the trial. R. 551.

word "BLACK," the pages on which the prosecution identified black prospective jurors as "B#1," "B#2," and "B#3," or the strike lists that contradict the "race-neutral" explanation provided by the prosecution for the strike of black prospective juror Marilyn Garrett.[4] Those notes provide powerful evidence of discrimination, all unrebutted by Georgia.

With respect to other notes, Georgia acknowledges them but seeks to minimize their significance. This is the approach taken with the venire lists on which the prosecution highlighted the names of the black prospective jurors in green.[5] Georgia suggests that the lists do not establish discriminatory intent on the part of the prosecutors because "'multiple staff members'" from the District Attorney's office were involved in making notes on the lists and "'[t]he motivation for passing lists and notes on individual jurors was to help pick a fair jury.'" Georgia's Br. at 9 (quoting Order at 17 (Butts Co. Sup. Ct. Dec. 9, 2013)). That argument falls flat for two reasons.

First, Georgia cannot assert, on one hand, that the District Attorney relied on his subordinates' notes "to help pick a fair jury," while at the same time arguing that the District Attorney should not be held responsible for his subordinates' discrimination. The staff members in the District Attorney's office, who were asked to help, knew exactly the type of information the prosecutors wanted. The reality is

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[4] *See* H. 961, 967, 973, 979, 984 (the juror questionnaires with the race question circled); H. 945-47 (the notes identifying black prospective jurors as "B#1," "B#2," and "B#3"); H. 939, 950, 951, 999 (the strike lists showing that the prosecution fabricated its explanation for striking Garrett).

[5] *See* H. 903-26 (the highlighted venire lists).

that the process of circulating lists and notes did help the prosecution select a specific type of jury—a jury that included only white people.

Second, the fact that the entire District Attorney's office was involved in creating the discriminatory notes makes the problem worse, not better. An office in which race discrimination is so engrained that lists of this kind are circulated broadly is one in which *Batson* violations are altogether more likely. *See Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 347 (2003) (inferring discrimination from the fact that "the culture of the District Attorney's Office" was suffused with bias).

Georgia also seeks to minimize the notes of Clayton Lundy, the prosecution's investigator. Lundy stated in a post-trial affidavit that race did not play a role in the prosecution's jury selection process. *See* R. 557. But in the original draft of the affidavit—which is now in evidence—Lundy fretted over what the prosecution should do "[i]f it comes down to having to pick one of the black jurors." H. 995. Georgia argues that Lundy's discriminatory viewpoint should not be attributed to the prosecutors because it was "solely [his] opinion." Georgia's Br. at 11-12. However, the prosecutors stated expressly that they relied on Lundy, who must have known what was important to them, when striking several black prospective jurors. *See, e.g.*, M.N.T. 41; *see also* R. 571-73 (the trial court acknowledging the prosecution's reliance on Lundy).[6] As with the highlighted venire lists, the prosecutors should not be permitted to escape responsibility for discrimination by blaming their subordinates.

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[6] Remarkably, Georgia relies on Lundy's statements denying discrimination, State's Br. at 10-12, while at the same time distancing the prosecutors from his discriminatory acts, State's Br. at 12.

After discussing the highlighted lists and Lundy, Georgia emphasizes that the prosecutors *said* they did not discriminate. Georgia's Br. at 12. If that fact were significant, *Batson* would have little meaning. This Court actually stated in *Batson* itself that a prosecutor cannot defeat a claim of race discrimination "merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'" *Batson*, 476 U.S. at 97 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)). Moreover, these are the same prosecutors who not only filled their files with discriminatory notes, but also withheld those notes at trial and on direct appeal in an effort to prevent the finding of a *Batson* violation.[7]

When addressing the "race-neutral" reasons proffered by the prosecution, Georgia takes on the wrong issue. Georgia's Br. at 14-25. It states repeatedly that the proffered reasons are not "inherently discriminatory."[8] But the question of whether the reasons are facially race-neutral or "inherently discriminatory" is a question for step two of the *Batson* analysis. *See Hernandez v. New York*, 500 U.S. 352, 360 (1993) ("A neutral explanation in the context of [step two] means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a

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[7] Foster requested the prosecution's notes from jury selection in both the trial court and the Georgia Supreme Court. The prosecution successfully opposed Foster's efforts. *See Foster v. State*, 374 S.E.2d 188, 192 (Ga. 1988) ("The trial court did not err by denying Foster's post-trial motion to review in camera the state's jury-selection notes.").

[8] *See* Georgia's Br. at 5 ("Contrary to Petitioner's claim, the state habeas court found that despite the newly tendered evidence, Petitioner failed to demonstrate the strikes were *inherently discriminatory* . . . .") (emphasis added), 17 ("The multiple race neutral reasons offered by the State prompted the trial court, the Georgia Supreme Court and the state habeas court to find the State's explanation for its dismissal of Mr. Hood race neutral and not *inherently discriminatory*.") (emphasis added).

discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."). This case involves step three, not step two. See Order at 15 (Butts Co. Sup. Ct. Dec. 9, 2013). The question at step three is whether the proffered reasons were *the actual reasons* for the strikes or a pretext for race discrimination. *See Miller-El I*, 537 U.S. at 339 ("In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." (quoting *Hernandez*, 500 U.S. at 365)).

The proper way to conduct a step three analysis is to consider "all relevant circumstances" to determine whether the proffered reasons were genuine. *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 240 (2005); *Batson*, 476 U.S. at 96-97.[9] Georgia fails to engage in that analysis. Like the state habeas court, it places substantial weight on the trial court and direct appeal rulings. *See* Georgia's Br. at 13-14 ("It is clear that the trial court carefully considered the State's reasons for striking the four jurors following Petitioner's *Batson* challenge in thorough questioning of the State both at trial and during the hearing on the motion for new trial and found the reasoning race neutral."); *see also* Order at 17 (Butts Co. Sup. Ct. Dec. 9, 2013) ("Importantly, this court notes that on direct appeal, trial counsel raised a claim that the trial court erred in finding that the prosecution provided race-neutral reasons for striking the four African-American jurors. The Georgia

[9] *See also Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) ("[A]ll of the circumstances that bear upon the issue of racial animosity must be consulted. Here, as just one example, if there were persisting doubts as to the outcome, a court would be required to consider the strike of Ms. Scott for the bearing it might have upon the strike of Mr. Brooks.").

Supreme Court affirmed the trial court's denial of this claim, finding that the prosecutor's explanations were related to the case to be tried, and were clear and reasonably specific."). Deferring to the trial and appellate rulings necessarily means failing to consider the ways in which the prosecution's notes, which were not available at the time of the trial and direct appeal, undermine the credibility of the "race neutral" reasons proffered for the strikes.

The strike of Marilyn Garrett demonstrates the problem with Georgia's analysis. The prosecutor explained that he had listed Garrett as "questionable" in his notes and decided to strike her only after Shirley Powell, another black prospective juror, was excused for cause. R. 438-39. That explanation may have seemed plausible at the time. *See* R. 574-75 (the trial court repeating the explanation). But none of it was true, as the prosecution's notes reveal. The prosecution had four strike lists, and Garrett was a "No" on all four. H. 939, 950, 951, 999. If it was known that the prosecutor was fabricating his explanations, the "race-neutral" reasons that purportedly supported the strikes of Garrett and others would not have been viewed as credible.

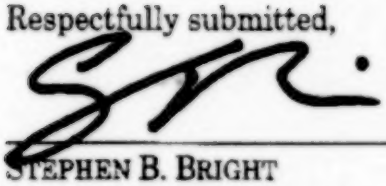
The strike of Eddie Hood provides another example. In the trial court, the prosecution proffered many "race-neutral" reasons for striking Hood, including his son's age, his wife's occupation, and his religious affiliation. H. 979-81. The trial court and the direct appeal court accepted those reasons as genuine. R. 567-70; *Foster v. State*, 374 S.E.2d 188, 192 (Ga. 1988). But the prosecution's notes change everything. They show that the prosecutors singled out Hood based on race,

identifying him as "B#2." H. 946. In addition, they circled four items on his juror questionnaire—the three items noted above and his race: "BLACK." H. 979-81. If race was not a concern, there would have been no reason for the prosecution to circle it on the questionnaire along with other issues it claimed to view as important. In light of that evidence, it strains credulity to accept the prosecution's representation that race was not a factor in the strike of Hood.

The critical point is that Georgia's approach, which involves viewing the proffered reasons separately and distinctly from the prosecution's notes, undercuts the force of *Batson*. The only way to conduct a constitutionally sound step three analysis in this case is to consider everything together—the race of the defendant, the race of the victim, the strikes of each and every black prospective juror, the "race-neutral" reasons proffered by the prosecution for the strikes, the evidence and arguments at trial, and the prosecution's notes, questionnaires, and other lists. No court has ever done that. The exceptional circumstances of this case warrant this Court's intervention.

For those reasons, Foster respectfully requests that this Court grant certiorari and evaluate the *Batson* issue in this capital case.

Respectfully submitted,



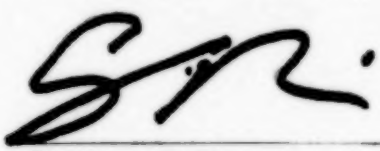
STEPHEN B. BRIGHT
Counsel of Record
PATRICK MULVANEY
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
sbright@schr.org
pmulvaney@schr.org

CERTIFICATE OF SERVICE

I, Stephen B. Bright, hereby declare that on March 24, 2015, I served this Reply to Georgia's Opposition to Petition for Writ of Certiorari on the State of Georgia by depositing an envelope containing the petition in the United States mail, with first-class postage prepaid, addressed as follows:

Richard Tangum
Assistant Attorney General
40 Capitol Square, SW
Atlanta, GA 30334

Respectfully submitted,



STEPHEN B. BRIGHT
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
sbright@schr.org

No. 14-8349

In The
Supreme Court of the United States

TIMOTHY TYRONE FOSTER,

Petitioner,

v.

BRUCE CHATMAN, WARDEN,

Respondent.

On Writ Of Certiorari To The Superior Court Of Butts County, Georgia

JOINT APPENDIX
VOLUME I

STEPHEN B. BRIGHT*
PATRICK MULVANEY
PALMER SINGLETON
SOUTHERN CENTER FOR HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, GA 30303
404-688-1202
sbright@schr.org

Counsel for Petitioner

SAMUEL S. OLENS
Attorney General

BRITT GRANT
Solicitor General

BETH A. BURTON*
Deputy Attorney General

SABRINA D. GRAHAM
Senior Assistant Attorney General

RICHARD W. TANGUM
Assistant Attorney General

40 Capitol Square, SW
Atlanta, GA 30334
404-656-3499
bburton@law.ga.gov

Counsel for Respondent

**Counsel of Record*

Petition For Certiorari Filed January 30, 2015
Certiorari Granted May 26, 2015

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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	to file certain expert affidavits	
39.	Petitioner's witness list	April 17, 2002
40.	Notice of intent to rely upon Affidavits	April 17, 2002
41.	Respondent's motion for a ruling on his March 1, 2002 motion for a more definite statement	May 30, 2002
42.	Amended consent scheduling order	July 15, 2002
43.	Amended consent scheduling scheduling [sic] order	November 4, 2002
44.	Notice of appearance of counsel	June 19, 2003
45.	Motion for status conference	September 12, 2003
46.	Scheduling order	December 19, 2003
47.	Petitioner's motion for limited extension of scheduling order	January 23, 2004
48.	Petitioner's motion for access to client for evaluation and testing	January 23, 2004
49.	Amended petition for writ of habeas corpus	January 27, 2004
50.	Response to petitioner's motion for extension of discovery period	February 13, 2004
51.	Amended scheduling order	February 9, 2004

52.	Order on motion for access to client for psychological evaluation	February 9, 2004
53.	Motion to require petitioner to narrow his witness list and provide legally sufficient affidavit list	March 26, 2004
54.	Notice of leave of absence	March 29, 2004
55.	Petitioner's motion for Suspension of scheduling order	April 7, 2004
56.	Response in opposition to petitioner's motion for suspension of scheduling	April 8, 2004
57.	Order on stay of proceedings	April 30, 2004
58.	Motion for status conference	April 26, 2004
59.	Respondent's renewed motion for status conference	March 1, 2005
60.	Renewed motion for status conference	September 6, 2005
61.	Notice of appearance	December 27, 2005
62.	Order on respondent's motion for status conference and respondent's renewed motion for status conference	February 20, 2006
63.	Emergency motion to preserve Evidence	March 9, 2006

64.	Fourth amended petition for writ of habeas corpus	March 9, 2006
65.	Scheduling order	March 20, 2006
66.	Petitioner's non-expert witness list	July 10, 2006
67.	Notice of intent to rely upon affidavits from non-expert witnesses	July 10, 2006
68.	Fifth amended petition for writ of habeas corpus	July 10, 2006
69.	Order for access	July 19, 2006
70.	Notice of intent to rely upon Affidavits from expert witnesses	August 3, 2006
71.	Notice of deposition	August 7, 2006
72.	Notice of deposition	August 7, 2006
73.	Respondent's witness list	September 12, 2006
74.	Return and answer to petitioner's fifth amended petition for writ of habeas corpus	September 12, 2006
75.	Notice of deposition	September 14, 2006
76.	Notice of deposition	September 14, 2006
77.	Notice of appearance and motion to substitute counsel	September 25, 2006
78.	Motion to limit the scope of the evidentiary hearing	October 23, 2006
79.	Consent to teleconference	October 23, 2006

80.	Motion for forty-five (45) day enlargement of time for filing petitioner's brief	March 18, 2010
81.	Respondent's response in opposition to petitioner's motion for forty-five (45) day enlargement of time for filing petitioner's brief	March 22, 2010
82.	Order granting forty-five (45) day enlargement of time for filing petitioner's brief	March 26, 2010
83.	Entry of appearance	May 17, 2010
84.	Objections to unauthenticated Exhibits	May 17, 2010
85.	Brief of the petitioner	May 17, 2010
86.	Post-Hearing brief on behalf of respondent	July 19, 2010
87.	Respondent's objections to petitioner's evidence	July 19. 2010
88.	Motion to permit the submission of affidavit testimony for purposes of clarification following the close of evidence	July 19, 2010
89.	Reply brief of the petitioner	August 16, 2010
90.	Response to the State's motion to permit the submission of additional affidavit testimony	August 16, 2010

91.	Response to the State's objections to petitioner's evidence	August 16, 2010
92.	Supplement to response to the State's objections	August 16, 2010
93.	Notice of authority: Batson case in which prosecutors' notations as to the race of black prospective jurors provided "strong evidence" of racial Discrimination	March 13, 2013
94.	Request for ruling on habeas corpus petition	September 3, 2013
95.	Notice of non-compliance	December 9, 2013
96.	Order denying petitioner's request for habeas relief	December 9, 2013

IN THE SUPERIOR COURT OF FLOYD COUNTY,
STATE OF GEORGIA

STATE OF GEORGIA INDICTMENT
#86-2218-2

vs.

TIMOTHY TYRONE FOSTER /

MOTION TO PRECLUDE THE PROSECUTION FROM USING ITS PEREMPTORY CHALLENGES TO EXCLUDE BLACKS

(Filed Dec. 11, 1986)

Defendant moves this Court pursuant to the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and from *Batson v. Kentucky*, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed 2d 69 (1986) for an order preventing the State from utilizing its peremptory challenges in a biased manner to exclude black persons from serving on the jury in this case. In support of this motion, Defendant shows the Court as follows:

1. That he is an indigent eighteen year old black person accused of the capital murder of an elderly white lady, and the State is seeking the death penalty.

2. The District Attorney's office in this County and his staff have over a long period of time excluded members of the black race from being allowed to serve on juries with a black Defendant and white victim. This practice follows two centuries of discrimination against black people in every aspect of the

criminal justice system. This practice violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and as Justice Marshal indicates in his concurring opinion in *Batson v. Kentucky*, 476 U.S. ___, 106 S.Ct. 1712, 1726, 90 L.Ed 2d 69 (1986) the *pernicious* nature of the racial discriminatory use of peremptory challenges is *repugnant* to the Equal Protection Clause.

3. It is anticipated that the District Attorney's office will attempt to continue its long pattern of racial discrimination in the exercise of its peremptory challenges.

4. The exclusion of members of a specific group from the jury when a Defendant who is a member of that group is being tried is done in order that the Defendant will receive excessive punishment if found guilty and to inject racial prejudice into the fact finding process and sentencing determination by the jury.

5. There is no non-racial basis for the prosecution's use of its peremptory challenges to exclude a disproportionate number of blacks from the jury.

6. The exclusion of a disproportionate number of black persons from Defendant's jury would violate his right to an impartial jury by a fair cross-section of the community guaranteed by the Sixth Amendment to the United States Constitution. *Taylor v. Louisiana*, 419 U.S. 522 (1975). As recognized by the United States Supreme Court, "the exclusion of Negroes from jury service because of their race 'contravenes the

very idea of a jury – a truly representative of the community' " *Id.* at 530. Thus, "the Sixth Amendment prohibits the prosecution's use of challenges to discriminate on the basis of race " *McCray v. Abrams*, 750 D.2d 1113, 1118 (2d Cir. 1984). *A person's race simply is unrelated to his fitness as a juror. Batson v. Kentucky*, 476 U.S. ___, 106 S.Ct. 1712, 1718, 90 L.Ed 2d 69 (1986).

7. There is even a move [sic] compelling need for an impartial jury in a capital case in order that there be enhanced reliability in both the guilt-innocence as well as sentencing phase of trial pursuant to the Eighth Amendment.

8. Thus, if the prosection [sic] is permitted to strike all black persons or a disproportionate number of black persons from the jury, the Defendant will be denied his rights to a fair trial, to equal protection of the law, to due process, and to protection from cruel and unusual punishment, guaranteed to him and to all other people in this country by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Defendant requests:

(a) that this Court grant another motion by Defendant that Questionnairs [sic] be sent to all prospective jurors in this case so that there can be an accurate determination of the State's motives when or if the State attempts to exclude blacks from this jury.

(b) that this Court restrict the District attorney from using its peremptory challenges and strikes in a racially biased manner.

(c) that this Court require the State to show that each one of its peremptory strikes of black persons is not racially motivated.

(d) for such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED

/s/ Robert K. Finnell
ROBERT K. FINNELL
Attorney for Defendant

1 W. 4th Ave., Suite 200
Rome, GA 30161
404/235-7272

/s/ James C. Wyatt
JAMES C. WYATT
Attorney for Defendant

[SEAL]

IN THE SUPERIOR COURT FOR THE
COUNTY OF FLOYD

ROME, GEORGIA

THE STATE OF GEORGIA	:	NO. 86-2218-2
versus	:	MURDER,
TIMOTHY TYRONE FOSTER	:	BURGLARY,
	:	THEFT BY
	:	TAKING

APPEARANCES:

FOR THE STATE:

Stephen F. Lanier, Esq., Rome, Georgia; and Doug Pullen, Esq., Columbus, Georgia

FOR THE DEFENDANT:

Robert K. Finnell, Esq., Rome, Georgia; and James C. Wyatt, III, Esq., Rome Georgia

Rome, Georgia, 27 April 1987

* * *

[1336] THE COURT: * * * Juror No. 2 through 37 come over here to the box and take up these two chairs here. The balance of you you [sic] go into the jury room, please.

All right. Gentlemen, are you now ready for the selection?

MR. LANIER: The State is ready.

MR. WYATT: Yes, sir.

THE COURT: All right. Call them out.

THE CLERK: When I call your name, please stand and remain standing until you are selected or not selected for the jury. Bonnie Harper.

MR. LANIER: The State accepts the juror.

MR. WYATT: Excused, Mrs. Harper.

THE CLERK: Wiley Ratliff.

MR. LANIER: The State accepts the juror.

MR. WYATT: Excused, Mr. Ratliff.

[1337] THE CLERK: Mary Hackett.

MR. LANIER: Excused by the State.

THE CLERK: Eddie Hood.

MR. LANIER: Excused by the State. Thank you.

THE COURT: Wait a minute now. I guess I pulled his out.

THE CLERK: Do you want me to go ahead?

THE COURT: Yes.

THE CLERK: Joyce Nicholson.

MR. LANIER: State accepts the juror.

MR. WYATT: We are content.

THE CLERK: Patricia Bing.

MR. LANIER: The State accepts the juror.

MR. WYATT: We are content.

THE CLERK: Myrtle Evans.

MR. LANIER: State accepts Mrs. Evans.

MR. WYATT: Excused, Ms. Evans.

THE CLERK: Evelyn Hardge.

MR. LANIER: Excused by the State. Thank you, Ms. Hardge.

THE CLERK: Anne Coultas.

MR. LANIER: State accepts Ms. Coultas.

MR. WYATT: Excused, please.

THE CLERK: Lou Ella Hobgood.

MR. LANIER: Excused by the State, ma'am.

[1338] THE CLERK: Did you say excused?

MR. LANIER: Yes.

THE CLERK: Victor Dedeurwaerder.

MR. LANIER: The State accepts the juror.

MR. WYATT: We are content.

THE CLERK: Ray Allen Tate.

MR. LANIER: The State accepts the juror.

MR. WYATT: Excused, Mr. Tate.

THE CLERK: Billy Graves.

MR. LANIER: State accepts Mr. Graves.

MR. WYATT: We are content.

THE CLERK: James Cochran.

MR. LANIER: State accepts Mr. Cochran.

MR. WYATT: Excused, Mr. Cochran.

THE CLERK: Dorsey Hill.

MR. LANIER: State accepts Mr. Hill.

MR. WYATT: Excused, please.

THE CLERK: Mary Turner.

MR. LANIER: They are not in the box.

THE CLERK: Oh, that is right.

THE COURT: All right. Now you four – can we put them in the upstairs jury room?

MR. LANIER: I have got all the evidence up there.

THE COURT: Oh, have you? Is there any objection [1339] to having them remain in the courtroom? They are not going to hear a thing in the world except you –

MR. LANIER: No, I don't have any.

THE COURT: Any objections to –

MR. FINNELL: No, Your Honor.

THE COURT: All right. Find your seats back here, if you will, Ladies and Gentlemen.

(The chosen jurors leave the box).

MR. LANIER: (out of the hearing of the jurors): Judge, Your Honor, the two blacks that have been excused have left the courtroom.

THE COURT: Who were they?

MR. FINNELL: Mr. Hood and Ms. Hardge.

THE COURT: Find Ms. Hardge and Mr. Hood. Have them wait outside the courtroom. I believe that is Ms. Hardge there.

A DEPUTY: Yeah, that is her.

THE COURT: All right. How about Mr. Hood? Can you catch him? I want them to remain.

THE COURT: We have got four jurors. These are all messed up of mine.

THE CLERK: Okay. You excused one out of the next panel, and you excused one out of the next panel. Do you want me to insert somebody's name in that, or just go ahead and call them?

[1340] THE COURT: Just call then like you have got them. How about Mr. Tate? Was he one of them that was accepted or excused?

THE CLERK: He was Defense 5.

THE COURT: All right. The first one I have got now is Mary B. Turner. Is that –

THE CLERK: She is the first one.

THE COURT: All right.

THE COURT: 38 through 72.

(Those jurors, 38 through 72, enter the courtroom).

THE COURT: We are missing two.

THE CLERK: Well, one was excused out of that panel.

THE COURT: Okay. Well, we need to call two more then. Just call the next two for this panel here.

THE CLERK: Nancy Cadle for No. 24, Shirley Powell. Nancy Cadle.

THE COURT: Nancy Cadle.

(Nancy Cadle enters the jury box).

THE COURT: Who is the other one?

THE CLERK: I don't know. The next one is on the next panel that was excused. So whoever is there should be there. When I call your name, please stand and remain standing until you are selected or not selected for the jury. Mary Turner.

[1341] MR. LANIER: Excused by the State.

THE CLERK: Charlie Haulk.

THE COURT (addressing Mary Turner): You wait outside the jury room.

MR. LANIER: State accepts the juror.

MR. WYATT: We are content.

THE COURT: Donald Hall.

MR. LANIER: State accepts the juror.

MR. WYATT: We are content.

THE CLERK: George McMahon.

MR. LANIER: Excused by the State.

THE CLERK: Claiborne LeRoy.

MR. LANIER: State accepts the juror.

MR. WYATT: Excused, please.

THE CLERK: Selena Hammond.

MR. LANIER: State accepts Ms. Hammond.

MR. WYATT: Excused,please.

THE CLERK: Anna Jo Gale.

MR. LANIER: Excused by the State. Thank you, Ms. Gale.

THE CLERK: Elbert Roberson.

MR. LANIER: The State accepts the juror.

MR. WYATT: Excused, please.

THE CLERK: Nancy Cadle

MR. LANIER: The State accepts Ms. Cadle.

[1342] MR. WYATT: We are content.

THE CLERK: John Hoban.

MR. LANIER: State accepts Mr. Hoban.

MR. WYATT: Excused, please.

THE CLERK: Stephen Horner.

MR. LANIER: State accepts Mr. Horner.

MR. WYATT: We are content.

THE CLERK: Linda Fincher.

MR. LANIER: State accepts Ms. Fincher.

MR. WYATT: Excused, please.

THE CLERK: Margaret Hibbert.

MR. LANIER: The State accepts Ms. Hibbert.

MR. WYATT: Excused, please.

MS. HIBBERT: I need to – I didn't know how to ask to be excused this morning.

THE COURT: You just have been.

MR. LANIER: You just have been.

MS. HIBBERT: Oh, did you excuse me?

MR. WYATT: I just did.

MS. HIBBERT: Oh, okay. I appreciate that.

THE COURT: All right. According to my numbering, it is 73 through what?

THE CLERK: 73 through 110. And then we need to call 113. He needs to come in too.

(Jurors 73 through 110 and Juror No. 113 enter the [1343] courtroom).

THE CLERK: When I call your name, please stand and remain standing until you are selected or not selected for the jury. Robert Milam.

MR. LANIER: State accepts Mr. Milam.

MR. WYATT: Excused, please.

THE CLERK: Shirley Jackson.

MR. LANIER: State accepts Ms. Jackson.

MR. WYATT: Excused, please.

THE COURT: C. A. Garrett.

MR. LANIER: State accepts Mr. Garrett.

MR. WYATT: Excused, please.

THE CLERK: Arlene Blackmon.

MR. LANIER: State accepts Ms. Blackmon.

MR. WYATT: We are content.

THE CLERK: Marilyn Garrett.

MR. LANIER: Excused by the State.

THE CLERK: Martha Duncan.

MR. LANIER: The State accepts Ms. Duncan.

THE COURT: Ms. Garrett, you wait outside the jury room and don't leave.

MS. GARRETT: Okay.

THE COURT: Who was the next one?

THE CLERK: Martha Duncan.

MR. LANIER: State accepts Ms. Duncan.

[1344] MR. WYATT: We are content.

THE CLERK: Mark Edward Floyd.

MR. LANIER: State accepts Mr. Floyd.

MR. WYATT: Excused, please.

THE CLERK: Mildred Hill.

MR. LANIER: State accepts Ms. Hill.

MR. WYATT: Excused.

THE CLERK: Hugh Hubbard.

MR. LANIER: State accepts Mr. Hubbard.

MR. WYATT: Excused, please.

THE CLERK: James Bevels.

MR. LANIER: Excused by the State. Thank you, Mr. Bevels.

THE COURT: What is his number?

THE CLERK: 113. Don Huffman.

MR. LANIER: The State accepts Mr. Huffman.

MR. WYATT: We are content.

THE CLERK: Leslie Hatch.

MR. LANIER: State accepts Mr. Hatch.

MR. WYATT: Excused, please.

THE CLERK: That is your last strike. Roy Hatch.

MR. LANIER: State accepts Mr. Hatch.

THE COURT: You are elected. That makes the jury. I believe you are Ms. Grindstaff?

MS. GRINDSTAFF: Yes.

[1345] THE COURT: Shall we leave her in as a –

MR. LANIER: Your Honor, may we approach the bench on that?

THE COURT: All right.

(The following colloquy is held at the bench with all counsel and the defendant present):

MR. LANIER: I am going to protest the leaving of Ms. Grindstaff as an alternate. I had saved one last strike for Ms. Grindstaff due to her opposition of the death penalty. We have alternates already

selected, and I have already spent the weekend looking over the alternates. I fail to see how leaving Ms. Grindstaff in the jury – it would put me in a tremendous disadvantage, Your Honor.

THE COURT: We have still got eight.

MR. LANIER: That is correct. That is the position we were in, is that she was in the panel of forty-two always. We picked eight extra alternates. That is my position.

MR. FINNELL: Your Honor, Ms. Grindstaff's views no longer become relevant. She is qualified. She is in the pool. The Court has stated that she is going to take them in the order that they come. She is the next available potential juror. She should be taken in order and not out of order just because the State [1346] has some objections to her qualifications when the Court has already qualified her.

THE COURT: She finally said that she could – in fact, she gave the correct answers to staying. I will leave her in.

(End of bench conference).

THE COURT: All right. Bring in Ms. Virginia Gaines Berry, William Jeffrey Howell, Robert E. Sumners, Walter S. Fuqua, Elizabeth Ann Hartis, Orvil K. Taliaferro, Carolyn T. Smith. That is it; isn't it? Isn't that eight?

THE CLERK: A. D. Branton.

THE COURT: Does it take him to make eight with Ms. Grindstaff?

THE CLERK: I am sorry, Judge. I didn't see Ms. Grindstaff.

THE COURT: Send them in.

(Those jurors mentioned above entered the courtroom).

THE COURT: All right. This is for the two alternates.

THE CLERK: When I call your name, please stand and remain standing until you are selected or not selected as an alternate. Bobbie Grindstaff.

MR. LANIER: Excused by the State.

THE CLERK: Virginia Berry.

[1347] MR. LANIER: The State accepts the juror.

MR. WYATT: Excused.

THE CLERK: William Jeffrey Howell.

MR. LANIER: The State accepts the juror.

MR. WYATT: We are content.

THE CLERK: Robert E. Sumners.

MR. LANIER: The State accepts the juror.

MR. WYATT: Excused, please.

THE CLERK: Walter Fuqua.

MR. LANIER: The State accepts the juror.

MR. WYATT: Excused, please.

THE CLERK: Elizabeth Hartis.

MR. LANIER: Excused by the State.

THE CLERK: Orvil Taliaferro.

MR. LANIER: The State accepts the juror.

MR. WYATT: We are content.

THE COURT: All right. That is the alternates.

MR. WYATT: Wait just a second. We are content, yes.

THE COURT: All right. That is the two alternates. All right. We are not going to need Mr. Branton or Ms. Smith. Ms. Smith, you are excused. You may go by the clerk's office to pick up your pay and turn in your badge. Mr. Branton, you are excused. Go by the clerk's office to turn in your badge and pick up your [1348] pay. Ms. Harper, I believe you were excused. So you can go and pick up your pay and turn in your badge. Is there anybody else that was excused that is still in the courtroom? Let's make sure that we have fourteen people over here. Call out the names, if you will.

THE CLERK: When I call your name, come into the box, please. Joyce Nicholson, Patricia Bing,

Victor Dedeurwaerder, Billy Graves, Charlie Haulk, Donald Hall, Nancy Cadle, Stephen Horner, Arlene Blackmon, Martha Duncan, Don Huffman, Roy Hatch. And the two alternates, William Jeffrey Howell and Orvil Taliaferro.

* * *

IN THE SUPERIOR COURT
FOR THE COUNTY OF FLOYD
ROME, GEORGIA

THE STATE OF GEORGIA	:	NO. 86-2218-2
versus	:	MURDER, BURGLARY, THEFT BY TAKING
TIMOTHY TYRONE FOSTER	:	
	:	

APPEARANCES:

FOR THE STATE:

Stephen F Lanier, Esq., Rome, Georgia; and
Doug Pullen, Esq., Columbus, Georgia

FOR THE DEFENDANT:

Robert K. Finnell, Esq., Rome, Georgia; and
James C. Wyatt, III, Esq., Rome Georgia

Rome, Georgia, 27 April 1987

* * *

[1352] (The jurors leave the courtroom).

THE COURT: Are there any witnesses in this case, in the courtroom?

MR. LANIER: Your Honor, other than the police officer witnesses that I am going to need for the Jackson-Denno motion.

THE COURT: Well, the first thing we need to do is take up the State's excusal of the black jurors.

MR. LANIER: Right.

THE COURT: My list is not complete. So I don't know the names.

MR. FINNELL: Your Honor, the Court might also ask anybody that has been under subpoena.

THE COURT: Pardon?

MR. FINNELL: Anybody that has been under a subpoena, not only a witness, but somebody that has been under a subpoena.

[1353] THE COURT: Is anybody in the courtroom that has a subpoena?

(No affirmative response).

THE COURT: Well, I take it that they would think they are a witness, if they have got a subpoena. Let's take care of the black jurors first. Do you have their names?

THE CLERK: I don't know who they are Judge.

MR. FINNELL: Your Honor, I can tell the Court who they are. There was Eddie Hood –

THE COURT: Eddie Hood.

MR. LANIER: Hold it. We are probably going to take this up outside their presence.

THE COURT: Wait a minute. Just stay out there.

MR. FINNELL: Evelyn Hardge, Mary Turner and Marilyn Garrett.

THE COURT: All right. The first one is Mr. Hood.

MR. LANIER: Your Honor, first of all under the Batson Challenge, they are the movants. And they have to – what the Supreme Court in Batson said, they have to make out a prima facie case of discrimination more – and, of course, the Supreme Court said, "Striking all blacks resulting in an all-white jury, the Supreme Court did not find as a matter of law that a prima facie case had been made by Batson. Rather, there has [1354] to be something else. So they are the movant, and I will – they have the burden of proof.

MR. WYATT: No, sir. We contend that the prima facie case has been made. The State had four blacks to choose from. They have ten strikes. Out of forty-two jurors, that is an average of less than one out of four on the average that they should use on any particular juror. They used all four on black jurors. Batson states that the practice violates their [sic] protection clause of the 14th Amendment to the United States Constitution.

In his concurrent opinion, Justice Marshall indicates that the pernacious [sic] nature of the racial discriminatory use of peremptory challenge is repugnant to the Equal Protection clause. We have made a prima facie showing by the mere fact there are no blacks on the jury despite the State having an opportunity to keep four blacks.

We also contend there is no independent reason to strike Eddie Hood. Eddie Hood reads the Rome News-Tribune daily and knew about the escape, but some twenty-nine of the forty-two jurors read the Rome News-Tribune daily. We do not see how knowledge of the escape hurts the State's case. He did not know any of the defense witnesses or the defendant's family, [1355] and he did not know the victim's family. We contend that there is no showing at all that Eddie Hood other than race itself –

I will now go further into Batson, and they say, "The prosecutor" – on page 1723 – "Once the defendant makes a prima facie showing, the burden then shifts to the State to come forth with a neutral explanation for challenging black jurors. Though this requirement imposes the limitations in some cases onthe [sic] full peremptory character of the historic challenge" –

THE COURT: Now don't get too fast.

MR. WYATT: Yes, sir. " – we emphasize the prosecution's explanation need not rise to the level justified in exercise for cause." But then it goes further, "But the prosecutor may not rebut the defendant's

prima facie case of discrimination by stating merely that he challenged jurors in defendant's race on the assumption or his intuitive judgment that they would be partial to the defendant because of their shared race."

We go to page 1721, and Batson doesn't even talk about total discrimination; it also talks about seriously disproportionate exclusion of Negroes in the jury venires. But we don't even have seriously [1356] disproportionate in this case. We have total, 100 percent, discrimination by the State and using its four challenges to challenge every black juror in this case. That is repugnant to the Equal Protection Clause as the Batson v. Kentucky decision states.

Going to the other black jurors, Mary Turner – Evelyn Hardge, first of all, did know the defendant's mother, had met her in the hallway, but she did not know any of the State's witnesses.

Mary Turner did not – I believe my recollection is right – did not know the defendant's family, but did know some of the – perhaps somebody involved in he [sic] case, but did not know the family at all.

Then the other black juror was Marilyn Garrett who did not know the defendant or his family and who only read the paper on Sundays and knew very little about the case. We contend that the State can absolutely not come up with any sort of explanation for excluding allfour [sic] blacks. We at this time interpose as strong an objection as we can from this case and this selection of the jury in this case.

THE COURT: All right. According to the Court's understanding of the Batson decision, the burden now shifts to you, Mr. Lanier.

[1357] MR. LANIER: According to the Batson decision, again it says, "The mere striking of all blacks in a particular jury is not in and of itself making out a prima facie case. There has to be something else." The mere fact that the State uses its peremptory challenges to challenge all blacks in a particular jury, then that is not of itself made a prima facie case. In fact, under Batson, it says, "The defendant is not entitled to a jury composed in whole or in part of persons of his own race; however, the prosecutor is entitled to exercise permitted peremptory challenges for any reason at all as long as that reason is related to his view of the outcome of the case."

Your Honor, the State, in Batson v. Kentucky, that was an armed robbery, and the prosecutor excused three of the – of all of the black jurors in that particular case on an armed robbery case of a convenience store. In this case, we have a death penalty, and I want to state for the record that when I look at a death penalty, I look for more reasons than race. Race is not a factor. Age of the person is a factor of the witness – of the juror. The gender, female or male, the religious preference is something I always look at. When I [1358] strike a jury, I look at those combinations. As we contend – as has been shown by the number of people that were excused, generally in my experience having prosecutred [sic] five – well, this is

my fifth death penalty case, women appear to be more sympathetic to jurors (sic) in a death penalty case than men. As indicative of the strikes that I used on my ten, I struck eight women. Eighty percent of my strikes were women.

Of the thirteen people that were excused by the Court for cause, because of their views on the death penalty, nine were women. So again, eighty percent to eighty-five percent of the people that were opposed to the death penalty that were excused for cause were women.

The second thing, men appear to be – in my opinion – to be more death penalty advocates than women. That has been borne out by the number of excusals under the death penalty. That has been born [sic] out by my strikes that I use. Again, in the forty-one cases that were excused for cause, and it is now forty-two due to Ms. Powell, the forty-two cases that were excused for cause and by agreement, thirty of them were women. Again, that is more than – sixty, seventy percent were women, and twelve men.

[1359] Women have a tendency in a case of this nature where the death penalty is being sought – they have serious reservations, time conflicts or whatever it may be, but that is what I look at when I am trying a death penalty case, and it is borne out by the fact of the excusals and agreements, that over seventy-five percent because of death penalty and other excuses were women who got off the jury panel.

In a case of this nature, when I am looking at the facts of this particular case, I look at the age of the victim,and I look at the age of the defendant. The defendant is nineteen years old now. The age of the victim was approaching eighty years. If you will recall, Your Honor, we had eleven blacks that were coming to this courtroom on April 20th, eleven.

Mr. Hood, a Mrs. Wilson, who was excused for cause. She was sixty-eight years old. Mr. Hood is forty-seven years old. Mrs. Wilson was sixty-eight years old, excused for cause. Mr. Hine was sixty-five years old and excused for cause. Again, these are sixty-eight and sixty-five years old, and I was looking for older, preferably living alone or retired, stable background, long-term [1360] community ties.

Mrs. Wilson was excused for cause. She was sixty-eight years old. Mr. Hines was excused for cause. He was sixty-five years old. Mr. Hardge, during the process, got a medical excuse, and he was excused by the Court. He was sixty-nine years old. Mr. Johnson, fifty-six years old. Ms. Turner was thirty-two. Wofford, excused for cause, was sixty-four years old. Powell, who has just been excused, was twenty-five. Garrett, was thirty-five. Mrs. Taylor, at the beginning of Court when we called the jurors on April 20th, she came up, and the Court excused her because of medical reasons. She was seventy-three. Brand was excused for medical reasons, and he was sixty-one.

One thing I failed to mention about Ms. Johnson, Juror No. 28, she didn't even show. I don't know why Ms. Johnson didn't show. There was no explanation given, and the sheriff was directed to go out and contact her. But of the eleven black jurors that were put upon the State, only four were left. So in other words, seven potential jurors had been excused for various reasons. Our position, the death penalty, age, medical reasons and familiarity with the defendant.

[1361] So that left me with four. Now with respect to Mr. Hood, I saw no problem with his age. He was exactly what I was looking for in terms of the age, between forty and fifty, good employment and married. The only thing that I was concerned about, and I will state it for the record. He has an eighteen year old son which is about the same year old as the defendant.

In my experience in prosecuting over twenty-five murder cases, I have had several cases where individuals having the same son (sic) as the defendant who is charged with murder has serious reservations and are more sympathetic and lean toward that particular person.

It is ironic that his son, and I don't know which son it is – Darrell Hood has been sentenced by my court, by the Court here, to theft by taking on April 4th, 1982.

THE COURT: That is his son?

MR. LANIER: That is Darrell Hood who resides at 13 Copeland Street, his same address. And he does say on his questionnaire that he has three boys ages 26, 22 and 18. There is a Darrell Hood that we have a conviction on that resides at that address, 13 Copeland Street, who was sentenced on April 12th, [1362] 1982, twelve months suspended sentence for theft by taking. Again, theft by taking is basically the same thing that this defendant is charged with.

Mr. Hood's wife also worked at Northwest Regional. All of my cases that I have excused are people that have worked at Northwest Regional, because-again, insanity is a defense in this case. Northwest Regional deals a lot with mentally disturbed, mentally ill people, and I did not want anybody from Northwest Georgia Regional. My experience in the past where insanity cases are involved that they intend to be more sympathetic and are for the underdog.

The juror himself questioned and asked to be off the jury. He said he had part-time commitments and other time commitments, and he wanted off. For no other reason than that, I could have excused him. But he asked and expressed a desire to be off.

During the course of the jury selection, as the Court will recall, he got food poisoning, and was hospitalized in the hospital. We were not sure exactly when and if he was going to be here. He did show up today, but for medical reasons obviously if somebody has a serious case of food poisoning and is hospitalized

during jury selection, I was not sure of his medical – or health capability.

[1363] He appeared in answering to his questions confused, in my opinion, soft-spoken, slow in response to questions, and certainly was very, very confused about the use of the word "automatic" and "death penalty" and life imprisonment. He was definitely slow in responding to the death penalty questions. He even hesitated.

His answers were very ambiguous and more importantly to me, he had no eye contact. One of the things that concerned me, Your Honor, is religious preference of jurors. His religious preference is Church of Christ. There have been four other jurors that have been excused for cause by agreement that belong to the Church of Christ, Juror No. 35, 53 and 78.

Evidently, the question was not asked of him whether or not his church took a stand against the death penalty. He did not respond to that. His church took a stand against alcohol. But it is my experience that the Church of Christ definitely takes a stand against the death penalty.

He also said that his brother counsels people in drugs, his brother. That concerned me, the fact that he had a relative who did counsel people involving drugs. And again, that is the primary defense in [1364] this case.

One other question that bothered me about Mr. Hood is that the defense did not ask him a lot of questions. I mean they were – you know, spent twenty-seven to thirty minutes on every white juror that we had here. But I will be able to establish that the average time spent on the four remaining black jurors was about seven to eight minutes. The defense did not ask a lot of questions. They spent ten minutes on him and didn't ask him questions about insanity, his views on it, about his church relation to the death penalty, about his membership of any social or fraternal organizations, his knowledge of the victim — did not ask him any questions involving his attitude on race or the attitude or the pressure of the community. He did not ask him any information on whether or not he knew somebody with an alcohol or drug problem. And again – or what his feelings about the race situation involving Murray v. Turner.

He didn't ask him any question about the age of the defendant in the death penalty case. You recall that they asked everyone [sic] of the jurors that question, but did not ask Mr. Hood. They did not ask him about his feelings about criminal responsibility [1365] involved in insanity, did not ask him about his feelings about Cocaine use, publicity or the community attitude or pressure.

Given the fact – again, he was exactly what I was looking for, because I think a crime of this nature transcends any racial bounds. I think people in the black community are just as offended about this as the whites. However, Mr. Hood was not asked all the

right questions. He didn't answer all the right questions. He has a son about the same age, and he has another son – I don't know which age he is – but again, he has been convicted of theft by taking. All of those reasons are why I said and I struck Mr. Hood. Again, under Batson, I don't have to strike anybody that amounts to cause. All I have to do is have a race neutral reason, and all of these reasons that I have given the Court are racially neutral.

MR. WYATT: Well, in explaining race, he also has now shown his opposition to the female sex, gender discrimination in this case. If you exclude the two black women, the numbers come down on the number of strikes that he used. Some women that he mentioned were excused by cause at our request, Your Honor. So he now gets to the age – having an older child [1366] like Tim Foster. We have several people who were selected on the jury – had children who are about the defendant's age or a little older. Billy Graves has several children. Mr. Dedeurwaerder had five children. Mr. Haulk has children twenty-five and twenty-six years old. Mr. Hall, ages twenty-eight and twenty-three. That is not a – age of the defendant and that being the reason because Mr. Hood has an eighteen-year-old child – is not a reason.

Further as far as us only questioning black defendants (sic) seven or eight minutes, the State has had the same right to question potential jurors in any length that they want to. I did not sit down with a stop watch. I don't know who has for the record. But I

believe the State inquired more into the black defendants than we did.

MR. LANIER: That is absolutely incorrect.

MR. WYATT: As I said, I did not keep a stop watch. But we contend there is nothing that has been shown in the State's explanation, and they do have the burden of proof now that it has switched to them that shows that the four strikes were nothing but based on race, Your Honor.

THE COURT: Well, the Court overrules the motion, and finds that Batson has been met. All right.

[1367] What is next?.

MR. LANIER: Ms. Hardge, H-a-r-d-g-e, Juror No. 22.

THE COURT: Well, I thought that we had covered the whole –

MR. LANIER: No, sir. I want to perfect the record on giving my reasons for the excusal of everyone of these jurors, because I think that five or ten years down the line I need to give a neutral explanation, and I have my explanations given and I want the Court to know my reasons for it.

With respect to Ms. Hardge, Juror No. 22, if you will recall, when she took the witness stand or took the stand, she admitted to the Court and to us that she had just talked to the defendant's mother outside the courtroom; however, she said that would not affect her. The fact that she did talk to the mother of

the defendant concerns me. She was, in my opinion – she was seventy years old, but her answers were totally incoherent. She had a son, she said, that was twenty-three years old – again close to the age of the defendant.

She had always noted in her questionnaire that she had been dismissed from prior jury service. The defense asked no questions, did not ask her a [1368] single question; however, we spent thirty minutes on an average to every other juror.

MR. FINNELL: Your Honor, let me just interpose an objection with regard to what the defense asked. The defense can ask whatever it cares to or does not care to ask. The State has gone so far as to copy the defense's questionnaire. So the State had every opportunity to ask all those questions if they thought they were pertinent. We don't have the burden here. They do. I object to Mr. Lanier trying to shift what we do or do not do. The burden rests with him and not with us.

MR. LANIER: Again, she said at first she was opposed to the death penalty. But if facts warranted – she appeared confused – ambiguous answers. She was very slow to answer the death penalty questions. She stated several times she would automatically vote for the death penalty, would automatically vote for life. When asked about death penalty questions, she made the statement, "What is going to be will be." And then she said, "I will vote for life regardless of the evidence. I am against the death

penalty, but despite my beliefs on death penalty, I could vote for it." If death penalty could be avoided, like it that way." Didn't answer all the questions [1369] on the questionnaire, and the Court had to take the time to make her fill it out again. She answered Question No. 27 mistakenly. She wanted off jury duty, have to see about her husband who is a double amputee. She did not list church affiliation and wasn't asked by the defendant anything about her religious beliefs. In my opinion, and its unfortunate – Mrs. Hardge is an extremely nice person – but she just did not answer the questions correctly. She appeared confused, very easily swayed, irrational, bewildered, incoherent. That is my concern about Mrs. Hardge. Mary Turner –

MR. WYATT: For the record, we have no response to his argument on Ms. Hardge.

MR. LANIER: Okay. On Mary Turner –

THE COURT: No response?

MR. WYATT: No response.

THE COURT: Well, I can rule on Ms. Hardge now. I feel that the State had ample reason to excuse her.

MR. LANIER: Yes, sir. On Mary Turner, again, she worked at Northwest Regional. Again, I did not want jurors who worked at Northwest Georgia Regional regardless of their capacity. She claims in Question No. 23 to be my investigator's half-sister, Clayton [1370] Lundy's step-sister.

THE COURT: Half-sister, she said.

MR. LANIER: Pardon?

THE COURT: Half-sister.

MR. LANIER: Half-sister. My investigator, who, is black, for the record said that she was not his half-sister. She appeared to me to be hostile to the Court and counsel when answering questions. She did not answer Question 32 correctly.

If you will recall, 32 is a question that says, "Do you have a close friend or relative who has been ever accused or convicted of a crime of violence?" She did not state in the record, but one of her step-brothers is Otis Turner. Otis Turner, Your Honor, if you will recall, is a repeat offender with this Court. In fact, he is on a particular drug charge right now. He has a lot of theft by taking and burglary charges, Otis Turner. When she did not answer the question posed by the defense, whether or not – she was asked whether or not she knew anybody with an alcohol or a drug problem, she said, "No."

Again, it is the position of the Court that she was being less than candid, because her half-brother is Otis Turner, who has been charged on [1371] five to seven different occasions with theft, burglary and drugs. My experience in that she said – her occupation is dispensing drugs throughout the State of Georgia, yet no one – she knows no one when asked the question about any drug problems. Again, she stated she didn't know anybody, and again, Otis

Turner who is charged in this court with Violation of the Georgia Controlled Substances Act – she said she didn't know anybody. That is inconceivable to the State.

She was more – in questioning, she was more courteous and pleasant to defense counsel when answering the questions, and she appeared hostile to the State's questions. She became very defensive.

The thing that concerned me most about Mrs. Turner was that she kept looking at the defendant when she was answering the questions, and she would not look at the State's counsel. She kept a constant eye contact with the defendant, and I looked at the defendant; and he kept a constant eye contact with her.

She appeared nervous when asked by the State regarding any question about the defendant. She hesitated very strongly when answering the death penalty question. She did not like answers to [1372] insanity – no, excuse me. I did not like her answers on the insanity questions as posed by the defense. She appeared confused at times, had to have questions repeated. Pictures made her sick, nervous stomach. Didn't like the question on race, "depends on person and where they come from." Now that was her answer.

Your Honor, it said – she said, "It depends on the person and where they come from." As the Court is well aware, the defense in this case is that the defendant is an underprivileged kid that because of his

environment is the one that committed this act. That is their defense, mentally ill. So again, her answer, "Depends on the person and where they come from," that is the whole basis for the defense. That is one of the reasons why I struck Mary Turner.

Again, when answering questions on temporary insanity said no. She said that she would not believe in temporary insanity, and they made no motion to excuse her for cause like they did on Mrs. Barbogello. There were repeated questions by the defense concerning her views on temporary insanity. She said she didn't believe in it. Yet, they made no motion to excuse her for cause, just like they did on Mrs. [1373] Barbogello. So I felt that my opinion that they obviously did not want to pursue it further with her – and I struck her. With respect to Mrs. Garrett –

THE COURT: Well, I think he is wanting to answer as to Mrs. Turner.

MR. LANIER: Okay.

MR. WYATT: First of all, it is our choice whether to excuse Ms. Turner for cause. He didn't ask to excuse her for cause either at that point. Working at the TB Control Unit, I don't see what that has to do with knowledge of the insanity defense, Your Honor. But still somebody what the State has said on both him and Mr. Hood is that he wants somebody ignorant on our defenses. I don't know if that is a good reason. I don't know what statistics has been done on eye contact and who is great at eye contacts

or whether eye contacts are on the record in this case. That is certainly an –

THE COURT: Anyway, in the interest of time, I think he has explained satisfactorily to the Court as to this last one – what is her name, Turner?

MR. LANIER: Yes. Mary Turner.

[1374] THE COURT: All right.

MR. LANIER: And with respect to the last juror, No. 86, this probably was the most potential witness – juror that I had. She was thirty-seven years old. The thing that concerned me about Mrs. Garrett, and again, when the – that is what is great about the State having – and the defense having voir dire. In some courts, the Court does the voir dire, and that leaves the attorneys out of that area. We have only about five or ten minutes to judge a person how they would vote in a case, by the way they look, by the questions that are posed, answers given and about how they appear in Court. I looked at her, and she would not look at the Court during the voir dire, kept looking at the ground.

Again, that to me, concerned me. Her answers were very short, if the Court will recall. In fact, Doug Pullen put down in his notes, "Almost curt and impudent. Said yeah to the Court on four occasions. Shows a complete disrespect for the Court and its authority." She appeared very shaky, very nervous. Her voice quivered. Not a very strong juror. She, in my opinion, was too young. She was thirty-four years old. She

said she was not familiar with the North Rome area, and unfortunately, [1375] in her questionnaire, she grew up – she went to Main Elementary or Main School, which is again two blocks from where this crime happened. She said – and yet she drives by the North Rome area every day from Morton Bend Road when she goes to work. She is divorced. Again, I was looking for stability. She has two jobs working seventy-eight hours a week and has two children, and yet she didn't ask off for any reason because of sequestration, with two jobs and two children didn't ask off.

The defense did not ask her questions about race, about integrated schools, about feelings about integration, about criminal responsibility, insanity, temporary or what, against alcohol, no questions – not much questions on publicity and no questions on pressure or attitude.

The thing that bothered me probably the most about this case and about this juror, and I would have taken her except for this one thing, her association and involvement in Head Start. Again, Head Start deals with low income, underprivileged children. From what I understand from the defense, that this is the central issue in their defense, that this defendant came from a low income underprivileged, disadvantaged youth, which caused what happened [1376] to Ms. White. Again, her affiliation, her relationship with Head Start and her age being so close to the defendant, and all the above questions caused me the greatest concern about Ms. Marilyn Garrett. So I

then chose to use my last – one of my peremptory strikes on her.

I again emphasize to the Court that eighty percent of my strikes were women. Unfortunately, three of the four blacks were women, and I – do you remember Tim Pape who is now a judge, – when the defense said I am now against women; I am not. I look for the cause of the case, which is the death penalty. Right from the very start in this case – right from the very start, we have been striking a jury for the death penalty. If the Court is aware – I am sure the Court is – there have been offers of pleas in this case. We are not here, and I am not here for the guilt/innocence case. I think we have a jury, and any one of those jurors would have been good for the guilt/innocence. I am looking at this case primarily for the death penalty, and despite the offers of pleas, I am going for the death penalty in this case. So my whole objective in striking eighty percent women and two men were their views on death penalty and their [1377] relationship to their environment and the defendant. That is my whole purpose, certainly race neutral. Thank you.

MR. WYATT: Just one comment on that. Now he has gone from "I am not striking them because they are black, because they can identify with-low income people." I don't think we need statistics to show that most blacks are on the lower economic level of society in this town, Your Honor.

We contend – he said that was his main purpose because she had worked with Head Start. We contend that is absolutely no reason to strike her.

THE COURT: Well, the Court is satisfied that Batson has been satisfied. The motion is overruled.

MR. FINNELL: Your Honor, I would like to make one addition on the record, and afterwards, the Court might want to direct an inquiry about it.

THE COURT: Do what?

MR. FINNELL: I would like to make an observation on the record concerning this, and the Court might want a follow-up inquiry into it by the State. That is, I am extremely impressed with the preparation that the State has done with regard to this Batson hearing. I am wondering – I am very curious, Your Honor, the statistics, the knowledge, everything [1378] that Mr. Lanier had laid out, I don't think he did it this morning. I think it was preplanned, and I think, Your Honor, that the Court might want to inquire as to the State as to whether or not they have done this with every juror, if they could give statistics like that in relationship to any other juror other than the four blacks. I almost bet they can't. If they can't, Your Honor, that shows that they arranged this entire stage. They did all these statistics in evidence just so they could justify their discrimination. Now if Mr. Lanier has that kind of background statistical data that he did on every juror, then I will be silent. But I have got a feeling that it

was just done on those four to five potential black jurors. If it was, Your Honor, then that showed that up there in the district attorney's office, they were up there saying, "Okay, guys, how are we going to have to justify striking these black jurors? Well, let's start pulling out the statistics on each one and comparing them to the pool as a whole, and then we will put that on the record. And when we do, then we can say we are race neutral."

But if those acts took place, Your Honor, and if they don't have that on every juror, then I would [1379] suggest to the Court that that would be evidence of purposeful discrimination on behalf of the State.

MR. LANIER: I want to make the observation, your Honor, – of course, defense counsel has obviously not read Batson v. Kentucky. Batson v. Kentucky does not require the State to list any reasons for their excusals, peremptory or otherwise of any white juror. But the thing that concerns me is that we made out of the four jurors, the black jurors, we made motions to excuse two of them for cause, and, of course, they were rehabilitated; and they remained in the jury pool.

There is a thing that also concerns me about this particular – about what the defense counsel is saying – as I told the defense counsel, and I told this Court, this crime crosses race boundaries. This crime offends black community just as much as it does white. I am sorry that I had to have – pick from eleven potential

jurors, I only had to have four to pick from. By process of attrition, seven of them have left us through medical, death penalty and otherwise.

I resent the implication, and I think Justice Rheinquest [sic] in the decision in Batson v. Kentucky said it perfectly well. "This Batson decision [1380] makes the prosecutor have to state on the record, and I don't like stating on the record anymore than anybody else my reasons for excusing potential jurors. I look at it color-blind. I have my reasons for excusing the white jurors just as well. But under Batson v. Kentucky, I don't have to give them.

THE COURT: Well, the Court has made its ruling, and the ruling shall stand.

* * *

IN THE SUPERIOR COURT OF FLOYD COUNTY,
STATE OF GEORGIA

STATE OF GEORGIA

vs

CASE NO.
86-2218-2

TIMOTHY TYRONE FOSTER

MOTION FOR POST-JUDGMENT DISCOVERY

(Filed Sep. 14, 1987)

COMES NOW the Defendant and pursuant to *Brady v Maryland*, 373 U.S. 83 (83 SC 1194, 10 LE 2D 215 (1963); *Batson v Kentucky*, 476 U.S. ___, (106 SC 1712, 90 LE 2D 69) (1986); and *Gamble v State*, 257 GA 325 (July 9, 1987) brings this Motion and in Support of this Motion he shows this Court as follows.

1.

That prior to the trial of this case a Motion For Discovery was filed by the Defendant and said Motion covered post judgment proceedings.

2.

That the State in this case during the *Batson* hearing read notes that indicated Marilyn Garrett was "almost curt and impertinent." Further, the State also noted that Marilyn Garrett said yeah four times, showing a complete disregard for the Court and its authorities. The record of this case indicates that

several jurors said yeah and uh-huh more that [sic] four times.

3.

During the *Batson* hearing the State argued to this Court that *Batson v Kentucky* does not require the State to list any reasons for their excuses, preemptory or otherwise, of any white juror. However, *Gamble v State* 257 GA 325, 327 clearly indicates that the prosecution's explanation offered for striking each black juror must be evaluated in light of the explanation offered for the prosecution's other peremptory challenges.

4.

In this case the State made it clear on April 20, 1987 during the *Batson* hearing that it did not have to justify its strikes of white prospective jurors, and that it did not evaluate its strikes of black jurors in light of its strikes of white jurors.

5.

The State in its Brief In Response to Defendant's *Batson* argument for an [sic] new Trial referred to its notes on several occasions as justification for striking black jurors or keeping or striking white jurors. Without admitting the veracity, admissibility, or weight of those notes, Defendant claims that if the State uses part of its notes to justify its exclusion of

black jurors in this case, then all of the notes should be available to this Court and other Courts which examines the intent of the State.

6.

Defendant contends that a review of the notes of State in this will likely reveal that the State conducted a more intensive investigation of the black jurors than of the white jurors and that the purpose of said investigation was to find reasons to exclude black jurors.

WHEREFORE, Defendant prays that this Court impanel all notes and records regarding jury selection in the possession of the State. That this Court conduct an in camera inspection of those notes and records and that the notes and records be sealed and deposited in the registry of this Court where they will be available for appellate review and/or post conviction relief if that be necessary.

Respectfully Submitted,

/s/ James C. Wyatt
James C. Wyatt
Attorney For Defendant

/s/ Robert K. Finnell
Robert K. Finnell
Attorney For Defendant

IN THE SUPERIOR COURT OF FLOYD COUNTY,
STATE OF GEORGIA

STATE OF GEORGIA	* CASE NO. 86-2218-2
	*
vs	*
TIMOTHY TYRONE FOSTER	*
_____/	*

ARGUMENT IN SUPPORT OF MOTION FOR POST JUDGMENT DISCUSSION

(Filed Sep. 14, 1987)

Batson v Kentucky, 476 U.S. ___, (106 S.C. 1712, 90 LE 2D 69) (1986) clearly establishes that when there is a black defendant on trial and an all-white jury is selected to try that black defendant, then the intent of the State in striking the black jurors is at issue and the State must prove that its intentions were race neutral in excluding those black jurors. The burden of proof is on the state.

The intention of the State is critical in this case. If the State meets its burden of proof, then the death penalty could remain. If the State fails to meet its burden of proof then the Defendant receives a New Trial. The Defendant is entitled pursuant to *Brady v Maryland*, 373 US 83 (83 SC 1194, 10 LE 2D 215) (1963) to all exculpatory information in possession of the State and Defendant makes the obvious observation that if the notes and records of the State indicate a discriminatory intention by the State, then

Defendant is entitled to have the Court aware of that intention.

Further, the State has referred to its Notes and Records on several occasions during both oral and in written arguments in justifying its strikes of blacks. Without admitting the veracity, weight, or admissibility of these notes, the Defendant claims that all of the State's notes now should be made a part of the record in this case and should be available for review by this Court and by all other Courts that will examine the intent of the State in excluding all of the potential black jurors in this case.

Respectfully Submitted,

/s/ James C. Wyatt
James C. Wyatt
Attorney for Defendant

/s/ Robert K. Finnell
Robert K. Finnell
Attorney for Defendant

IN THE SUPERIOR COURT OF FLOYD COUNTY,
STATE OF GEORGIA

STATE OF GEORGIA

VS.

TIMOTHY TYRONE FOSTER

CASE NO.
86-2218-2

ORDER ON MOTION FOR
POST-JUDGMENT DISCOVERY

(Filed Nov. 16, 1987)

THIS MATTER came before this Court by motion filed by the Defendant, through counsel. Having considered the motion and authority cited by Defendant, the Court denies his request that the Court impanel all notes and records which the State has concerning jury selection, that the Court conduct an in camera inspection of those notes and records, and that those notes and records be sealed and deposited for appellate review.

The Defendant cites in support of his motion Brady v. Maryland, 373 U.S. 83, 83 S.C. 1194 (1963). Defendant's reliance is misplaced. On appeal from a death sentence, the defendant Brady challenged the withholding of a confession by his companion that the companion had committed the actual murder for which both had been tried and found guilty. Although Brady's attorney conceded that his client was guilty of murder in the first degree, he believed that knowledge by the jury of whom actually did the killing would induce them to render his client a life

sentence, rather than a death sentence. In that case, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87, 83 S.C. at 1196.

There is no question that the Court meant evidence concerning such things as whether a crime was in fact committed, whether the defendant tried is the one responsible for said crime, and whether some fact exists which a jury might find to mitigate the punishment otherwise called for. The focus is clearly upon the action or inaction of the defendant, not of the prosecutor, and upon the information available to a jury to determine its verdict and sentence. The only role the prosecutor has under Brady v. Maryland is to provide information concerning guilt or innocence of a defendant to a defendant, or to provide information touching upon what punishment would be appropriate for a given defendant. Both are types of evidence which would be given to a jury to consider.

The defense refers to its entitlement to "exculpatory information" under Brady. The Court agrees. However, it declines to render the word "exculpate" a term of art, thereby divorcing it from the layman's understanding of its meaning: to clear from alleged fault or guilt. Webster's Ninth New Collegiate Dictionary 443 (1983). Regardless of the State's motives in striking black jurors, nothing found in its notes

concerning jury selection will tend to clear the Defendant in this case from alleged fault or guilt.

Further, the Georgia criminal discovery statutes, O.C.G.A. sections 17-7-210 and 17-7-211 provide no basis for the Defendant's motion.

In addition, it is noted that the material sought by the Defendant to be impaneled is such as would fall under the work product doctrine. The highest court of the land has declared that this doctrine applies in criminal as well as civil cases. United States v. Nobles, 422 U.S. 225, 236, 95 S.C. 2160, 2169 (1975).

Wherefore, for the foregoing reasons, this Court denies Defendant's motion for post-judgment discovery.

So ordered this 16th day of November, 1987.

/s/ John A. Frazier, Jr.
J.S.C., R.J.C.

IN THE SUPERIOR COURT OF FLOYD COUNTY
ROME, GEORGIA

THE STATE OF GEORGIA VERSUS TIMOTHY TYRONE FOSTER, Defendant	No. 86-2218-2, Motion For New Trial

APPEARANCES:

FOR THE STATE:

Stephen F. Lanier, Esq., Rome, Georgia

FOR THE DEFENDANT:

James C. Wyatt, III, Esq., Rome, Georgia

November 24, 1987, Rome, Georgia

BE IT REMEMBERED, the above-entitled motion came on for hearing on this date before the HON. JOHN A. FRAZIER, JR., Judge of said Court, when all parties announced ready.

The following proceedings were had and evidence introduced, to wit:

Motion for new trial.

* * *

[2] THE COURT: Be seated. Where is the defendant?

MR. LANIER: He's not required to be at these motions for new trial.

THE COURT: Are you sure?

MR. LANIER: Yes, sir.

THE COURT: All right. Let's go.

MR. WYATT: Your Honor, we call Steve Lanier. The defense would call Steve Lanier to the stand.

MR. LANIER: We would like to know for what purpose the defense is subpoenaing – not subpoenaing, but calling myself to the stand. I've already filed an affidavit with the Court stating my reasons during the jury selection, and he has served me with a subpoena last week; and I would like to know what his proffer would be.

MR. WYATT: First of all, our proffer would be, Judge, we – let me just explain. The Batson case indicates that if the defendant establishes a prima facia case of racial exclusion or discrimination, then the burden falls on the State to prove that the discrimination and the exclusion of blacks was for a non-racial reason. It was not race related.

There are several statements in the Batson case, which I would like to quote to the Court [3] now. At page 1721, the Batson Court said, "In deciding if the defendant has carried his burden of persuasion, a Court must undertake a sensitive inquiry into such

circumstantial and direct evidence of intent as may be available."

At page 1722, "When circumstances suggest the need, the trial court must undertake a factual inquiry that takes into account all possible explanatory factors in that particular case."

Page 1724, "By requiring trial courts to be sensitive to racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice."

The State in this case has consistently read from its notes. The State has given an in-depth analysis of its jury selection process. The State has made statements about its intent. We have asked for an in camera inspection in this case, which we think would have avoided this cross examination. The in camera inspection was denied. We ask that we cross examination the State on the following areas: First, on religion as a criteria. Secondly, whether or not the State used, what I call uncomplimentary terms in describing white [4] jurors. The State used terms such as "rude, hostile, slow" to describe – and almost pertinent, impertinent terms like that to describe the black group. We would like to ask for a cross examination to see if that criteria was used on white jurors also, such as subjective criteria, and we believe the Gamble case indicates that the examination of the black strikes must be made in light of the examination of the white strikes, which the State used also.

We also intend to go into a case five years ago, the State versus Ronnie Duck. In that case there was a hung jury. One juror held up. That juror, we expect to show, was a black juror. We expect to offer evidence that this district attorney made certain comments about the juror; about whether or not that juror should be prosecuted. He complimented the white jurors, and did not compliment the black juror in that case. And we ask to go into those areas, because we think they are pertinent and go to the heart. The only issue in the Batson case is the intent of the State. Thank you.

MR. LANIER: Your Honor, if you will recall when – if the defense wants to look – the defense [5] requested through their Brady motion or post-Brady motion to look at our notes. In conference, we offered our notes to the Court if provided the defendant would provide his notes as well, and the Court could look at both the State's and the defense's notes to look and see if any derogatory terms were applied to each particular juror. Obviously, the defense has seen fit not to do so. The Court has already ruled on its post-Brady motion, and properly denied such.

I think to require the State prosecutor to get up on the stand and explain what he said derogatory toward any other jurors, obviously, I think is improper. We will let you look at our notes provided the defense would let the Court look at his notes, and the Court would have access to all of those notes and look at all the terms that were used. If you will recall in that in camera or closed session, not in camera

session with the Court, you know, we – you know, the defense was equally concerned because they used terminology as to certain particular jurors like we used terminology as to certain particular jurors. I don't think it's proper for the defense to require the State to get up on the stand, use the district [6] attorney to say what derogatory terms he used for other jurors that were not selected in this case.

I think I've read Batson twenty-five times, and I've read all of the cases involving Batson. At no time does Batson or any other case require the State to explain its acceptances of those people who did not eventually serve on the jury. The only time Batson and Gamble state is that the State is required to explain his challenges for the three, four blacks in the Foster case, in the Batson case, the four blacks. In all the cases, it says, "explains his challenges, his strikes" For the defense to require the State to explain his 32 acceptances and any derogatory terms involving the 32 acceptances, I don't think any case that I've read, both State and Federal, require us to do so.

The sole issue is the exclusion of these blacks who were put upon us during jury selection, and in relationship to the other strikes, "challenges" as it says in Gamble v State that the State used as applied to the other whites. Challenges, strikes, not acceptances, and so to require us to go into that, I think is improper. I think to require the State to go into a case that happened [7] in 1981, which was six years ago, and in the jury selection, I think is also improper.

The defense made – had an even opportunity – had more than ample opportunity to raise this issue prior to the selection of the jury in the Foster case. It obviously knew about this case in 1981. It said in one of its motions that the State had used historically – had historically used strikes against black defendants. It cannot – you know, the Duck case has absolutely no bearing to this particular case which happened six years ago (sic). So I would object, just on the record.

I think under Batson, Your Honor, there are three stages – four stages. First of all, they have to make a prima facia [sic] showing that the State intentionally discriminated in the selection of its excusal of a black juror. The second stage, if they pass that burden, the Court makes a ruling that they have made a prima facia [sic] case. It goes into the third that the State offers neutral, legitimate, non-racial, specific explanations – offers. And then the fourth and final stage, the Court evaluates the responses along with the allegations and reaches a decision. And in this case, you know, there is no case that – even Batson or [8] any other case that we've looked at that requires the prosecutor to take the stand. If the defense counsel has a case which requires the prosecutor to take the stand, I'd like to know about it.

THE COURT: Well, I would also.

MR. WYATT: Okay. Thank you, Your Honor. I would like to make just a couple of comments.

Batson requires more than an offer to the State or even a statement by the State if such an explanation is a racial issue. It requires that the State meets the burden of proof in showing that its reasons were –

MR. PULLEN: I'm sorry. I can't hear.

THE COURT: You're getting lower and lower and lower, and you're getting farther and farther and farther away from the mike.

MR. WYATT: Batson requires that the State meet the burden of proof. The burden of proof is on the State to show that the total of serious disapportionment and exclusion of blacks is race neutral. We contend there's no other way to check into the burden of proof except to have a thorough cross examination of the State.

Justice White in the Batson decision said that the contrary to Batson will be determined [9] later, and it will require much litigation. Batson is new law, and I guess the Court, defense attorney and the State, nobody really knows where it's going; but we contend that this is one area that Batson will go in, and we ask to open that area right now, cross examination of the State. Our motive is not at issue. There are no Batson cases that say that the defense's motive used in strikes is an issue. I will state that – also the State says that we're looking at whether or not they used derogatory terms in the use of white jurors, and it is our expectation, if we cross examine the State, we will show a lack of derogatory terms for the white

jurors – the type of derogatory terms that were used for the black jurors.

THE COURT: Well, at this time, I know of no law that would give you the right and opportunity for putting the district attorney on the stand and cross examining him; so I am denying that motion.

MR. WYATT: Yes, sir. Your Honor, we have nothing further to offer as evidence.

MR. PULLEN: Your Honor, excuse me. If questions that he might have that might be proper were propounded on an individual basis, that the [10] record might need some explaining on that sole issue, that is our objection. We feel like that since this is the last opportunity to complete the record before we go up, there are some things that are not in the record, that we would like to put in the record before we close, if he's through; but our specific objection is him trying to expand the Batson decision.

We don't know of any case which requires us to be put up. If there are questions that he has that the Court might share, we have no objection to him propounding those questions to the Court, and the Court directing them to us; so that we could have a complete record. But we don't think it's proper or professional to have a defense counsel to place a lawyer on the witness stand and cross examine him on something, particularly, in this case, since (1.) Our reasons were stated originally at trial. (2.) They have been restated since then in pleadings. Now if he has something to disprove that, or anything of that nature – he

mentioned one thing, I think, going about religion or something. If the Court feel that's a proper question, then we don't mind answering that question; but to get up and start talking [11] about derogatory terms and that kind of thing, I don't think there's any evidence at this point that any of those terms have been used. Terms have been used that somebody might not appreciate, but you feel like they're not derogatory terms, but terms that describe that juror.

THE COURT: Let me ask a question. Is it not a violation of the Code of Professional Conduct of Lawyers to put another lawyer on the stand? I remember something about that. Not having been covered by that in a number of years, I probably have not kept up with it, but there's something in there about lawyers taking the witness stand.

MR. LANIER: Your Honor, something about lawyers subpoenaing other lawyers that are parties in the case that are representing or counsel in the case as to witnesses, but I don't know the specific canon that you're referring to; but I know of a prohibition of attorneys taking the stand. I think one of the cases that we cited — not cited, but one of the cases is Arkansas. It's an Arkansas case. It's a 1978 case. It says, "When a prosecutor states something on the record to the court, he is considered an officer of the court; and he is not required to be placed under [12] oath." That's my, I think, my objection. You know, our situation is, requiring me to take the stand and be placed under oath – I stated my reasons. I stated them in open court, and I filed an affidavit; and I'm

an officer of the court, and I stated my reasons. We feel like they were legitimate, specific and non-racial and related to the case to be tried. My objection, for the defense to require me to take the stand and then be placed under oath and then inquired upon about a case that happened six years ago and about other derogatory terms used on other jurors that were not even selected in this particular case was my objection.

I know, and I think our situation – we do want to perfect the record on certain things, and, you know, out of an abundance of caution, Judge, I think basically – I know that the Supreme Court of Georgia and probably the 11th Circuit might feel differently about the Court's ruling. Despite the Court denying the motion, I would like to voluntarily take the stand and be subject to cross examination by the defense, but I want it within the guidelines of Batson; and I don't think that, (1.) The defense should be allowed to [13] look at my notes, because the Court has already ruled on that issue. But he wants me to refer to my notes, and I think that's what he's trying to get to my notes by taking me – putting me on the stand and cross examining me and putting derogatory terms of other witnesses; and I think also, under the purview of Batson and everything about taking the stand and being cross examined with respect to a case that happened seven years ago – six years ago, I don't think is relevant to what happened in the jury selection at issue. But I think with the Court's ruling, and I'm trying to get some direction here, because I know that

I don't want this case remanded because of an inability or failure for this sensitive inquiry. But I just would like, if I take the stand, I would like for defense counsel to be put on notice that I don't want him to have access to my file. I don't think it's proper to have to put into evidence derogatory terms toward other jurors that weren't selected in this case, and also about the Duck case that happened seven years ago. I don't think that's proper, but I think we ought to – I ought to take the stand and let him ask questions; and we ought to be allowed to object on a question-[14]by-question basis, and let the Court make its ruling at that time.

THE COURT: All right, if you're wanting to do that.

MR. LANIER: All right.

* * *

STEPHEN LANIER

THE CLERK: You do solemnly swear that the testimony you give to the Court on this issue and motion hearing between the State of Georgia and Timothy Tyrone Foster who is charged with murder, shall be the truth, the whole truth and nothing but the truth, so help you God?

MR. LANIER: I do.

THE CLERK: Thank you.

THE COURT: I think that oath might should have read, "who has been convicted of murder."

MR. LANIER: Right.

THE COURT: Instead of, "who is charged with – ."

THE CLERK: Okay.

* * *

CROSS EXAMINATION

BY MR. WYATT:

Q Okay. You're Steve Lanier, is that correct?

[15] A That's correct.

Q You're the district attorney?

THE COURT: Now, Mr. Wyatt, talk loud enough where the gentleman over there can hear you. But you get farther away from that, and you get lower and lower.

Q You are the district attorney here in Floyd County?

A That's correct.

Q And as district attorney, you did try the Timothy Tyrone Foster capital murder case?

A That's correct.

Q And you were assisted full time by Doug Pullen, who is an assistant district attorney?

A That's correct.

Q From Columbus, Georgia?

A That's correct.

MR. PULLEN: Your Honor, with the Court's permission, I'm going to become a juror.

THE COURT: You're going to have to, because he's like the witnesses that I fuss at all the time. You can't hear him.

Q As part of trying this case, both you and Mr. Pullen conducted the voir dire – jury voir dire in this case?

[16] A That's correct.

Q I believe it was about a four-day process from April 24th through April the 27th. Is that correct?

A I know that it went five days, Monday through Friday, and then broke for the weekend, and reconvened on Monday morning for the selection of the jury.

Q Okay. Did anybody else in your office assist full time on the jury selection process?

A Mr. Lundy did, Clayton Lundy.

Q Clayton Lundy?

A Right.

Q So he was involved in all aspects of it too?

A That's correct. Clayton Lundy is my chief investigator, who is black.

Q And over the weekend, between April 24th and April 27th, y'all did select your strikes and keeps during that weekend. Is that correct?

A We had all possibilities, but we looked at the negatives and the questionables; and we did make a determination as to who we would select, or who we would strike on Monday morning.

Q I believe you began with – there were 40 – there were a total of about 52 jurors questioned. Is that –

A Yeah, I don't recall how many were questioned.

[17] Q And out of that, the first 42 was to be the panel which the twelve jurors were selected?

A That's correct.

Q The next eight, the two alternates; and then we had two or three for safety's sake in case any of them fell through over the weekend?

A That's correct.

Q In selecting the 42 jurors, I take it it's the State – the prosecution's strategy to decide the 10 strikes. Is that correct, to decide 10 strikes and 32 keeps?

A To exclude or to cull ten people that we felt we would be an unfavorable juror in this case.

Q Okay, and since the State does go first in the jury selection, it goes before the defense, you pretty well have to decide your ten strikes and stick by them. Is that correct?

A We have – we tell you that it's a game of chess. A lot of times we accept people knowing full well that the defense is going to strike. It's – we – the ten people that we felt very uncomfortable with, we have to know up front.

Q And you have to pretty well select the ten specific people who you intend to strike?

A That is correct.

[18] Q Okay. Let me ask you, was religion – is religion a factor to you – religion of the juror, in deciding whether or not a juror – to keep or strike a juror in a death penalty case?

A It is.

Q Okay. Could you just describe how religion is a factor to you?

A Well, being a preacher's son, of course, I'm – being a Baptist preacher's son, religious – the Baptist religion that I know of does not take a stand against capital punishment. In talking with several people I know, and experience in the death penalty cases I've tried, the Roman Catholic Church takes a stand, not against death penalty, but that the life is precious,

and this was, obviously, evidenced by three to four people being excused because they were Roman Catholics. And I think the Catholic church does take – I don't know that they take a stand, but I do look at them very closely when I'm looking at a death penalty case. In a guilt/innocence case, I have no problems with Roman Catholics.

The Church of Christ, in talking with Doug Pullen, who's tried some 17 to 18 death penalty cases, the Church of Christ people, while they may not take a formal stand against the death penalty, they are very, very reluctant to vote for the death penalty. Mr. Pullen, of course, will [19] state on the record his experiences with the Church of Christ at a later point in time in our hearing, but it was his concern, which was shared by myself, that Church of Christ people are reluctant or would not vote for the death penalty. This is also evidenced by the fact that two or maybe three, I can't recall how many of the Church of Christ jurors, who were white, were excused for cause because of death penalty reservations.

Q Is there any particular religious groups that you find are very much pro-death penalty?

MR. PULLEN: Excuse me, Your Honor. Pro-death penalty has nothing to do with why certain jurors were struck in this particular case, unless he can demonstrate that those jurors were of that group. We have had no objection, up until this point, because it is a part of our race-neutral reasons, but we feel like he's exceeding those bounds now.

THE COURT: What was the question again?

MR. WYATT: I asked him if he found if any religious groups tended to be pro-death penalty.

THE COURT: I sustain the objection.

Q Well, let's go ahead and get to the individual jurors. You did, in fact, strike Eddie Hood, who was Church of Christ. Is that correct?

A That's correct.

[20] Q And you stated in your arguments that you struck Mary Hackett partly because she was Roman Catholic?

A That is correct.

THE COURT: Now wait a minute. Who?

MR. WYATT: Mary Hackett, Your Honor.

Q And that you struck George McMahon partly because he was Roman Catholic. Is that correct?

A Well, primarily because of his reservations against the death penalty, which was, in my opinion, Catholic related.

Q But also you did mention in your argument that his association with the Roman Catholic Church was one of the reasons?

A That's correct.

A And I believe you stated in your brief that you kept Arlene Blackman, this is on page 7, even though she has been associated with the Roman Catholic Church. Is that correct?

A That's correct. Even though I looked at her association with the Roman Catholic Church, and I liked her answers as to the death penalty, which I did not like the answers of Mr. Hood or Mr. McMahon; and also, she attends church on an irregular basis, which having been brought up in the church, knowing full well what an irregular basis meant. I felt like her association with [21] the Roman Catholic Church would not hinder her or prevent her from reaching a death penalty in this case. Obviously, with the verdict, we were correct in our assumption.

Q Evelyn Hardge, a Methodist Episcopal, did that – was religion any factor in striking her?

A No, religion wasn't a factor with Evelyn.

Q Okay. Two of the potential jurors were Holiness, Mary Turner and Shirley Powell, who was one of the 42 jurors empaneled after – she was excused for cause on Monday morning, April the 27th, and I believe you stated on the record you intended to strike Shirley Powell. Is that correct?

MR. PULLEN: Excuse me, Your Honor. What we had intended to do does not –

THE COURT: That doesn't enter into it. I sustain that objection.

MR. WYATT: Judge, if I can respectively [sic] disagree. What their intent is is an issue at this point.

MR. PULLEN: Our intent on these jurors that were removed that he has variously claimed and then not claimed that were done for racial reasons. That's the issue.

THE COURT: I think what they did is important, but not what they intended to do but didn't do.

[22] MR. WYATT: Your Honor, he has in his brief stated on the record his – what he calls strategy, and he went in depth explaining his strategy in striking – in intending to strike Shirley Powell and intending to replace her with another juror.

MR. LANIER: But as the record reflects, she was excused for cause, which really has no bearing then on this Court's – and to no objection by the defense.

THE COURT: All right. I made my ruling.

Q Bobbie Grindstaff, the Church of God, you did strike her, is that correct?

A I certainly did.

Q Did her association with the Church of God have any bearing?

A I had no way of knowing that. All I know is she was definitely against the death penalty, even

though we made a motion to strike her for cause, she was really rehabilitated by yourself, and we were not going to have Bobbie Grindstaff, who is a white juror. Now whether or not her church relationship played anything with her death penalty reservations, I have no way of knowing.

Q Anne Coultas is associated with the Mormon Church, and you did keep her.

A She is not a juror.

[23] Q But you did keep her. Is that correct? She was one of the 42 jurors that you considered in reaching your ten strikes.

THE COURT: Isn't that the same thing I just ruled on?

MR. PULLEN: I thought so. I would like to request that the Court keep Mr. Wyatt to the issue at hand required by Batson, and that is if there are racially-neutral reasons to remove those jurors that he's complaining about. As of this point, I've had discussions, when we were up here the last time, and some of the jurors that were black, I understood there was no issue to. I think he ought to define those jurors that he's now questioning, and we ought to restrict the questioning to why those jurors were removed.

Q Okay. Let's go to Marilyn Garrett then. She was Baptist. Is that correct?

A That's correct.

Q She was one of three Baptist jurors which you struck. Is that correct?

A I don't have any way of – I don't recall that.

Q I argued that – I contended that in my brief.

MR. PULLEN: Excuse me a minute. We're going back now to a comparison. If this comparison is [24] intended to show that – well, if it's intended for impeachment purposes, then we have no objection to it, if he wants to show that the district attorney is not telling the truth; but for any other purpose, we object to it, because it exceeds the bounds of Batson.

THE COURT: What is your purpose?

MR. WYATT: Your Honor, my purpose is to show that the State kept 24 out of 27 Baptist jurors; that two of the Baptist jurors were struck. One of her expressed her reservation against the death penalty, and the other one hesitated on the death penalty question; and the only other Baptist juror that was struck was Marilyn Garrett, who was black.

I think that's – you know, if the State wants to open the door on religion, I think we have the right to go all the way on it, Your Honor, and that's all we're asking. They've opened it in their arguments time and time again.

MR. PULLEN: Your Honor, there are the – the problem that we run into, and that's particularly demonstrated by the last filing that Mr. Wyatt made, you cannot separate one of these issues. When we

come up here, and we have a juror; and we talk to the juror, religion is a portion of it. But it's [25] not all of it. Now we have no objections to going into that. I think Mr. Lanier has stated succinctly, as much as he could, why certain faiths we look at more than we do others. Some of them, I agree. Some of them are my suggestions. Some of them, he and I disagreed. Part of it – I mean, that's neither here nor there.

The question is: Why were these jurors, and he has yet to name the ones that he's talking about, why were they excused; and I don't see anything wrong with just asking the question which has been answered prior to any evidence being heard in the trial and in all of these post-trial pleadings that have been filed.

MR. WYATT: I have no response, Your Honor.

THE COURT: Well, go back to your question. Let me hear that again.

MR. WYATT: Your Honor, there's been some argument since the last question. Let me maybe rephrase it.

Q Marilyn Garrett was Baptist. Is that correct?

A That's correct.

Q And she was struck, is that correct?

A That's correct. Religion made no part in the strike of Marilyn Garrett.

[26] THE COURT: Excuse me. Was she black or white?

MR. LANIER: She was black.

Q Did religion have any effect on the 24 white jurors that – white Baptist jurors that you kept?

MR. PULLEN: Your Honor, we're back once again to the people that were kept.

THE COURT: I don't think Batson goes that far yet.

MR. WYATT: I think Gamble does though, Your Honor. It says, "We must examine the strikes of black jurors in light of the strikes of whites."

MR. LANIER: Well, strikes, yes, but not acceptances. That's my objection to the question.

MR. WYATT: We would contend that the strikes and acceptances are inter-related. They're a part of the same process that we're talking about here.

A I'll just say this, Mr. Wyatt, religion – I looked at religion basically with the Church of Christ and the Roman Catholic Church. I used those two religions as the primary concern about death penalty reservations. I've already stated that I did not consider that the Baptist affiliation took a stand against the death penalty, and Baptist, being affiliated with the Baptist Church, did not affect my consideration of Marilyn Garrett.

Q Okay. In your Batson brief, you indicated [27] that Eddie Hood was, – I believe in the Batson argument, was slow in response to questions, and was very, very confused about the use of the words "automatic" and "death penalty" and "life imprisonment" Did you find that any of the other jurors were confused on the death penalty question?

MR. PULLEN: Objection, Your Honor, to "the other jurors". The question was this man, and the totality of his answers. I don't think you can separate one factor, and certainly, I can't sit here after this length of time and recollect every – 50 jurors and make a comparison so that Mr. Wyatt can jump on an answer like a duck on a June bug and say, "Well, how about this one? How about that one?" That's an improper question. It's one that's impossible to answer.

MR. WYATT: Judge, well, it is possible to answer, first of all. And this is one of those several subjective criteria which the State could use. The objective criteria don't worry me, because we've pretty well answered those. But there's no way to check the subjective criteria except to ask the district attorney whether or not he made similar determinations of other jurors, and see if he examined the white jurors the same way he examined the blacks.

[28] MR. PULLEN: We did not examine. The Court examined on those issues, Your Honor. The Court can, I assume, have the same recollection

Mr. Wyatt, Mr. Lanier and myself has. If not, then it's in the record what his responses were.

THE COURT: I think the objection is good. I sustain it.

MR. WYATT: Your Honor, for the record, I wanted to ask similar questions about Mary Turner and Marilyn Garrett, but since the Court has ruled this out, I won't do it.

THE COURT: You want the record to show that you would have?

MR. WYATT: Yes, sir, I do.

THE COURT: All right.

Q Okay. You did – let me ask this. You did note that Marilyn Garrett said "yeah" four times. Is that correct?

A That's correct.

Q Is that your basis for saying she has complete disrespect for the Court and its authority?

A As I stated in my affidavit, this juror's demeanor played a major part in her excusal by the State. As noted in the record and from the prosecutor's notes, this juror appeared to be hostile to the Court, very [29] short answers, almost to the point of being curt and impudent, disrespectful to the Court by not looking at the Court in its voir dire and answered questions by "yeah", having no eye contact with the prosecutor in his questioning, appearing

nervous and shaky, with her voice quivering, and looking at the floor when questions concerning the death penalty were being asked by the Court. In short, the time the prosecutor – the short time the prosecutor had to examine this prospective juror, the juror exhibited what appeared to a poor attitude or a partiality. And I considered her to be a risk, based on her courtroom demeanor.

Q Would you agree or disagree with me if I told you Bonnie Thomas said "yeah" or "uh-huh" thirty-six times?

MR. PULLEN: Your Honor, there is a difference between saying, "Oh, yeah, I understand," and looking at somebody – it's a tone-of-voice type thing. We object to this. We also object to the comparison that's being made. Mr. Wyatt has yet to ask Mr. Lanier why this juror was struck. I was privy – I was not here for the striking of the jury. I did compare notes. I do know what the reasons are, and I don't see that it's helping this Court to go through and get something that is so peripheral that it doesn't even matter in the central matter of things. [30] The comparison is our objection right now, Your Honor.

MR. WYATT: Since he's talking about the central matter of things, in the central matter of things, it has been a comparison of the use of strikes of black and white jurors.

MR. PULLEN: Your Honor, if he wants to compare what our reasons are, and he is not in ignorance of those, we stated them at least twice; and yet

he is going to things that – when we answer a question on something like Batson, we're placed in a most uncomfortable position. We're being called racist for doing our jobs.

MR. WYATT: Your Honor, for the record, I have not used the term "racist."

THE COURT: Do not interrupt him.

MR. PULLEN: It's either – it's at least implied in there. We have to come forward with our racially-neutral reasons. In order to do that, we throw in our whole entire evaluation of a juror. Now central to this, and Mr. Wyatt knows it; and we've told the Court, is this woman – the thing that turned me off, and the thing that I recall most distinctly, and correct me if I'm wrong, this is the social worker, the lady that worked at Head Start. That's the reason we did it. Now if he can demonstrate [31] that we took other people who were social workers, then that might very well be something to go into. But we're getting amorphous, particularly when we're getting into use of just particular black-lettered language out of the transcript. There's a difference between tone of voice, attitude, inflection, that kind of thing, and somebody else might answer in exactly the same fashion but give the impression to us that that juror is sympathetic. And that's something that cannot be established by what he's trying to do, just who used short answers, "Uh-huh, yeah; no," that kind of thing at this juncture. It's just totally impossible.

MR. WYATT: Your Honor, they are – they open up a door, and then they object when we come through. They opened up the door counting "Yeahs" and "Uh-huhs", "Yeahs" anyway; not us. Now they object to us asking about it on other jurors.

MR. PULLEN: That's not the criteria, Your Honor. The criteria is why we removed these jurors. If he wants to go into those criteria and go down the whole and entire list – you cannot separate one factor from another. We're judging a total human being up there, religion, their answers, their attitudes, the whole shooting match.

[32] THE COURT: And you've indicated an inflection, a voice inflection, I believe.

MR. PULLEN: Yes, Your Honor.

THE COURT: I agree with you that you can answer the same question the same way but with a different voice inflection, which would, to me, give me a different meaning or a different attitude, we'll say. Not meaning necessarily, but attitude. I sustain the objection.

Q Okay. Both in your Batson argument and in your Batson brief, you indicated that Marilyn Garrett was being less than truthful when she said that she was not familiar with the Morton Bend area.

THE COURT: Was not familiar with the –

MR. WYATT: Not familiar with the Highland Circle area.

A Well, the question was: Was she familiar with the north Rome area, and her answer was, "No." And, yes, I felt that that was not correct. When I looked down on the questionnaire and found out that she had gone to Main Elementary School, which was less than two blocks from – that's in the north Rome area, number one, and that is less than two blocks from Highland Circle, where the crime took place.

I also noted that she works at Head Start, which is [33] on Reservoir Street, which is between three or four city blocks from where Tim Foster lived. I felt like she was being less than candid with the Court.

Q Okay. Let me ask you these questions. Is Main High located on the route from Morton Bend – I'm sorry. Is Highland Circle located on the route from Morton Bend to Main High? Do you go by Highland Circle?

THE COURT: Did you say "Morton Bend"?

MR. WYATT: Yeah, Morton Bend, out in the Coosa area, Your Honor. That's where Marilyn Garrett lived when she went to high school, and she was bused to Main High School from the Morton Bend area.

A I had no idea which route she took at that time.

Q You know Rome, don't you?

A I certainly do.

Q Any direct route, would it be on the way?

A Would Highland Circle be on the way?

Q Would be on the way?

A It would not be a direct way from Morton Bend.

Q. It would be out of the way. Is that not correct?

A I'm not saying it's out of the way. It's less than two city blocks, less than two blocks. But the question was asked: Was she familiar with the north Rome area.

[34] She said, "No." And the north Rome area is Main Elementary.

Q All right. Are you correcting that to say that she should be familiar with the north Rome area but not the Highland Circle area?

A When you say "correcting", I'm saying that when she said that, she was not familiar with the north Rome area, and yet she went to school there; and she works there, I felt that her answer was inaccurate.

MR. WYATT: Your Honor, we've made the offer into other testimony, and that's all the questions we have.

* * *

DIRECT EXAMINATION

BY MR. PULLEN:

Q Mr. Lanier, prior to the trial of the case, prior to the jury selection, you and I had extensive discussions on the selection of this particular jury. Did we not?

A That's correct.

MR. WYATT: Your Honor, they have stopped us from going into areas such as this, and we would make the same objection.

THE COURT: What's the purpose of this?

MR. PULLEN: Your Honor, I'm going to demons-[35]trate, not only did we not have a – did we not discriminate in this case, but that we had no intent; and our purpose was, in fact, the contrary, and that there were good and sufficient reasons for us to actively look for black jurors in the trial of this case.

MR. WYATT: Your Honor, he is – during the Batson hearing, during his Batson argument and the affidavits, which I have not seen yet, it indicated what his intended motive is. The Court has restricted us from going to this area while he's on the stand, and we ask that you now restrict the State on cross examination.

MR. PULLEN: Your Honor, there's a – I'm sorry.

MR. WYATT: On direct, I'm sorry.

MR. PULLEN: There is a difference. What he was doing was trying to go into the relationship between these strikes and other jurors. We want to go in and zero in strictly on what Batson talks about, and that is, removing jurors of the defendant's race; and we want to be able to demonstrate to this Court that not only did we have race-neutral reasons, but we had reasons not to discriminate in this particular case.

THE COURT: Well, now I let that in. That is [36] what we're after.

MR. LANIER: Yes, sir.

MR. PULLEN: Thank you.

Q In this particular case, other than the confession that's involved, Lisa Stubbs was to be, and we felt like would be up into the trial of the case when she backed up, the primary witness?

A That's correct.

Q And is she white or black?

A She is black.

Q Did we not have a discussion about taking several black jurors to avoid the – what's commonly referred to as the white-lynch-mob argument the defense lawyers will make to jurors during the sentencing phase of the trial?

A That's correct.

MR. WYATT: Your Honor, I object to that unless he knew we intended to make that white-lynch-mob argument.

THE COURT: I sustain the objection.

MR. PULLEN: Your Honor, it just goes to our planning in advance. We, of course, there's no way that we can know that.

Q Was there not also a discussion that this case would basically transcend race because it involved elderly, and that cases involving children and elderly people [37] generally do not have racial overtones unless they're built into the case?

A That's correct.

Q Other than the difference between the races of the victim and the defendant in this case, were there any other racial aspects to the case?

A No, there were not.

Q Of course, when – let me just ask you this. The Church of Christ business, where did that come from?

A You.

Q I just wanted that to be clear, and also, Mr. Lanier, did – if we had selected, as we had discussed, a number of jurors that we have discussed, then perhaps we would have avoided this Batson claim, and that's another legitimate reason not to be involved in this kind of thing.

A That's correct.

MR. WYATT: Your Honor, that calls for a conclusion of law. I'd object to that.

THE COURT: Conclusion on whose part?

MR. WYATT: His.

MR. PULLEN: Your Honor, it's his intent that's being inquired into, his and mine.

THE COURT: That's my understanding. I overrule the objection.

Q Now insofar as jury selection goes, how long [38] have you been involved in serving the people of Georgia in prosecution, either as an assistant district attorney with the prosecuting attorney's counsel or as district attorney of this circuit?

A Also ten years now.

Q During that time, have you read literature by other prosecutors on how to select jurors?

A I have.

Q What is the attitude that they universally have toward social workers?

A Stay away from them. As I stated in my affidavit, social workers tend to relate to people and tend to sympathize with an underdog, and the defendant in this case, knowing the facts up front, what the defenses were and knowing the social-economic

condition of the defendant, you know, I wanted to stay away from any social worker.

Q Can you give the Court an example of what you're talking about from this very same case?

A I think the prime example is one witness that was called by the defense, named Marnie Dodd. If the Court will recall, she was a social worker, somewhat, in our opinion, burnt out, because she referred to her clientele as "pond of scum" But she was the type of person that we wanted to stay away from.

MR. WYATT: Your Honor, I'm going to object to [39] going into Marnie Dodd's testimony, because that was after the jury selection took place.

MR. PULLEN: Your Honor, we're offering it only as an example. We don't insist upon it.

THE COURT: I'll let it in only for that, because he's right. It was after the selection.

Q Now I had made a statement, and you and I had discussed it on several occasions, that the State does not select a jury, particularly in a death penalty case, but culls a jury. Would you acquaint the Court with that discussion?

A Yes, sir. Obviously, since we have an inequity in strikes, the defense has twenty, and we have ten, we don't get to select a jury. The defense selects a jury. We only have the opportunity to cull out those people that we feel like would not vote for a particular defendant or a verdict of guilty or the death

penalty in this case. We were up front with the Court in telling the Court back on April the 27th, that, you know, we were after the death penalty; that we probably could have taken the first twelve people in the box on the guilt/innocence. But our questioning of these jurors was primarily, and our concern and the way we voted in our strikes, were concerned primarily with the death penalty case and phase, and whether or not they would have backbone or the where-[40]withal or the knowledge or whatever it took to vote for the death penalty. So with our ten strikes, we have to cull out those people that we have even the slightest reservation about, concerning the death penalty.

Q One other question. Based on your experience and your research insofar as the selection or culling of the jury, what is the standard attitude insofar as jurors who themselves or their families have criminal connections?

A I, in the two hundred and some odd jury trials that I have tried and the now five death penalties that I have tried, we stay – I stay away from jurors with family members who are, you know, criminally connected in some way or another. That concerned me about, obviously, Mary Turner, because of her family situation involving her brother-in-law, her own husband. She's even been sentenced by this Court – not she has, but her husband has been sentenced by this Court for carrying concealed weapons in a public gathering.

I wanted to stay away from her. Eddie Hood, of course, had a son the exact same age as the defendant and had a prior theft by taking conviction from our district attorney's office, from this circuit. So we – I stay away from jurors that have, you know, either themselves or their family members have criminal convictions or a criminal record.

[41] Q The Head Start lady, I believe, had a relative too that was – that had just had a right high profile drug case being prosecuted or was in the process of prosecuting that in court.

MR. WYATT: Your Honor, he's leading the witness.

MR. PULLEN: I have him on cross examination.

THE COURT: That's right.

A That's something that Clayton Lundy, my investigator, had informed me during the jury selection that Marilyn Garrett, her first cousin is Angela Garrett. As the Court will recall, two months prior to the jury selection, she was arrested. She was a basketball coach at one of the local schools, and she was arrested for cocaine and terminated; and my investigator was concerned about her relationship with this first cousin; the fact that the police did cause her job to be – her coaching job to be vacated, and the fact that she knew a relative that had just been recently arrested for cocaine; and yet she denied knowing anyone with a drug or an alcohol problem.

MR. PULLEN: I think – Your Honor, I think we've covered all the people. I would like to inquire of defense counsel, because I had varying signals from him, as to which jurors they now feel that we need to establish racially-neutral reasons on. I [42] don't think that would be an improper question.

MR. WYATT: I think all of them, Your Honor. Batson brings every one of the black jurors into issue.

THE COURT: Well, I didn't sit here and count, but have you covered them all?

MR. PULLEN: Well, Your Honor, in a previous discussion, Mr. Wyatt had indicated –

MR. WYATT: I'll concede Evelyn Hardge.

MR. PULLEN: All right. Evelyn Hardge, that's the one we have not gone into. There were some other concessions at the time, but I don't want to go into those now. Have we talked about Mr. Hood, Mr. Garrett and Mrs. Turner, have we not?

MR. LANIER: That's correct.

MR. PULLEN: That's all I have.

* * *

REDIRECT EXAMINATION

BY MR. WYATT:

Q Steve, you say you want to avoid jurors with family members with criminal connections. Is that correct?

A That's correct.

Q You kept Martha Duncan?

A That's correct.

Q She had a nephew who was convicted and served [43] time for an armed robbery. Is that correct?

A That's correct, and as I stated, the reason I kept Martha Duncan was that she had very good answers on the death penalty. She was a teacher, which I wanted. She lived close to the area, which I wanted, and she also was very confused when answering a question about the nephew. She didn't – you know, that's in Atlanta on an armed robbery thing that I didn't think it was a close relative, and I didn't feel like in any way that that would impair her from reaching a death penalty in this case; and, obviously, the fact that she voted for the death penalty, we were right in that assumption.

Q You also, on Martha Duncan, noted that she lived very close to Highland Circle and worked very close to Highland Circle. Is that correct?

A That's correct.

Q Yet she stated that she was not familiar with the Highland Circle area?

A That's correct.

Q Did you find any reason to believe she was being less than truthful on that?

A No.

Q Yet you found that Marilyn Garrett was being less than truthful with you?

A Yes, I did. Marilyn Garrett, again, works in [44] and, you know, went to school in, and I felt she was less than truthful.

Q Well, Martha Duncan works in and lives in –

A And the question to her was: Are you familiar with the Highland Circle area, if I'm not mistaken. She was not asked the question: Are you familiar with the north Rome area. She was asked the question if she was familiar with the Highland Circle area. Had that question been asked of Marilyn Garrett, then I probably wouldn't have had any reason to suspect her.

Q You also, in your brief, mentioned that you try to avoid jurors with family psychiatric problems. Is that correct, a history of psychiatric problems in the family?

A Well, on an insanity case, yes. I think my primary concern was with the Northwest Georgia

Regional Hospital. We do have a regional psychiatric facility in Floyd County.

Q You kept Arlene Blackman, who used to be associated with Northwest Georgia Regional?

A She was no longer employed with Northwest Regional, but while she was employed with Northwest Regional, she was in maintenance.

Q Well, so was Eddie Hood's wife. She was in food service, wasn't she?

[45] A She was still employed.

Q In food service?

A At Northwest Georgia Regional. I wanted to avoid any juror that was presently employed at Northwest Georgia Regional.

Q But used to – that's the difference. Arlene Blackman used to be employed at Northwest Georgia Regional. Is that correct?

A That's correct. She was no longer – she's a housewife.

Q One of the reasons for striking Eddie Hood was that his brother used to, years ago, be involved in law enforcement as a drug consultant. Did "used to" matter in that particular analysis?

MR. PULLEN: Your Honor, he's comparing oranges, apples, lemons, grapes, coconuts, every different kind of thing in this. I think we have stated

our reasons, and up until this point, that had not even been raised. He's beating a horse that can't even be dead, because it's never been brought to life.

MR. WYATT: I want to know when "used to" is a valid reason, Your Honor. That's the only thing we're seeking.

THE COURT: I'll let him answer that.

A Mr. Wyatt, as I stated, I did not want anybody [46] who was presently or whose spouse was presently employed at Northwest Georgia Hospital. As I said, in my ten years experience of prosecuting ten insanity cases, I did not want anybody associated with the mental hospital on a present basis. Obviously, had I found out that Arlene Blackman – in looking at her in the past, she made – she stated on the record she had no training, no training in psychiatry; so I wasn't concerned about Arlene Blackman. Plus, I also really liked her questions, her answers to the death penalty. She felt like anybody who pleads insanity, that that's just a trick, that they – just to – it's an excuse, and I liked her answers on the death penalty; so I evaluated, as Mr. Pullen says, the whole Arlene Blackman. And I evaluated the whole Eddie Hood. The bottom line on the striking of all those things, and we have all these reasons put forth, but the bottom line on Marilyn Garrett, obviously, was Head Start. The bottom line on Mary Turner was, obviously, she was less than truthful with the Court and because of her family's criminal history. And the

bottom line on Eddie Hood is the Church of Christ affiliation.

Q Okay. Let me ask you on Eddie Hood and Mary Turner. Had either one of them had any training in psychology?

A I have no way of knowing that. I don't know.

[47] Q You have no way of knowing it?

A I don't know that.

Q It was asked, wasn't it?

A I don't know. I don't recall.

Q But you do have a way of knowing whether Arlene Blackman had any training in psychology? Correct?

A I couldn't understand your question.

Q You do have a way to know whether Arlene Blackman had had any training in psychology or psychiatry?

A You asked the questions, yes; and she responded. And I liked her answers.

Q When did you first point out to the Court that Marilyn Garrett had a sister with problems, Angela?

THE COURT: Had a what?

MR. WYATT: I'm sorry, had a first cousin with problems with cocaine?

A This is something that the court reporter and I have gone over time and time. It was during a break or at some point in time during the trial, I let the Court know that as an afterthought, that Mr. Lundy had advised me about Marilyn Garrett. And I advised the Court. The law clerk remembers it. I certainly remember, and unfortunately it's not on the record. We have examined that record. We have listened to the tapes. It's not on there. I'm not bringing out something today that I [48] didn't let the Court know six months ago, but I wanted to perfect it to let you know, to let everybody know that that was one of the reasons about our concern of Marilyn Garrett; that she did have a first cousin that had been arrested for cocaine; that my black investigator was concerned enough about her relationship with that first cousin to talk to me about it during the jury selection and to make me aware of it. Through inadvertence or oversight, I did not let the court know about it when I gave my reasons, but shortly after that, I stated on the record what my reasons were as an afterthought. It's just not there.

MR. WYATT: Can I confer with Mr. Pullen?

MR. LANIER: Sure.

(Inaudible colloquy between Mr. Wyatt and Mr. Pullen.)

Q But you do remember that you told the Court this sometime after the jury was empaneled?

A Yes, it was certainly after the jury was empaneled; and I can't recall at what point in time. I thought it was after the first day, but shortly thereafter.

MR. WYATT: That's all I have.

MR. PULLEN: You can come down.

MR. LANIER: All right.

THE COURT: Anything further?

MR. WYATT: That's all the evidence that we [49] have, Your Honor.

THE COURT: How about the State?

MR. LANIER: Nothing.

MR. PULLEN: Your Honor, I would like to just state in my place my reasons for – seeing that it's the one ambiguous place now in the record is my counseling Mr. Lanier about members of the Church of Christ. And I will be glad to state in my place and answer any questions that Mr. Wyatt might have.

When I first began prosecuting, back in 1972, I made the acquaintance of a man named Harry Golden, who was a retired United States Marine Corps master sergeant. Mr. Golden was in security, retail security for Sears and Roebuck in Columbus. He and I became close friends. Harry was a lay minister, and subsequently pastored a church that was majority black in Columbus. On a few occasions, I wouldn't tell the Court how many, it certainly was not regular, I

attended that church to listen to my friend preach. He and I had discussed this matter on many occasions. He has never, in fact, told me point blank that there was any tenet of that church that involved the death penalty. He did caution me, when we began – as best I can recall, perhaps 1975, as we discussed jurors in capital cases, to be extremely cautious [50] of members of his own faith. I did not inquire.

It had been my experience that it was rare to find a member of that faith that would pass the Witherspoon, and now Witherspoon/Witt test. The vast majority of them, and in this case, if I recall correctly, and I believe I pointed this out to Mr. Lanier, three out of four jurors who professed to be members of the Church of Christ, went off for Witherspoon or Witherspoon/Witt reasons. Subsequent to that time, in a case – and Mr. Lanier is right. We don't select a jury. We just get rid of those folks that are the absolute worst. The disparity in strikes just takes jury selection strategy out of what we do.

There was a case tried that I was co-counsel on, in Columbus, where a member of that faith was on the jury. There was subsequently a verdict in the case. The verdict was death, but that jury remained locked up for an extended period of time. I was acquainted with one of the members of the jury, who specifically told me that this woman's reasons were religious. They went to her faith. She thought she could do it, but she could not turn her back on her faith; and that was my reasoning in this particular case.

[51] MR. WYATT: Your Honor, if I may interject. He is doing the exact same thing that the Court has not allowed me to do. He's going into past cases to give his reasons for either keeping or striking a juror. The Court – we had earlier proffered some testimony about –

MR. PULLEN: (Interposing) Jamie, I can't hear you.

MR. WYATT: We had previously proffered some testimony regarding the Duck case, where a black juror hung that up, and the Court restricted us from going into counsel's past experiences with juries; and we think that is somewhat contradictory. We'll contend that, Your Honor.

THE COURT: All right.

MR. PULLEN: That was the end of my explanation for the court's benefit. I do not claim to be an expert, but those two things, the advice that I received from my friend, followed by the experience that we had on the only occasion that I'm familiar with that one ever served, just left us cold on those folks, Your Honor.

THE COURT: All right. If there is nothing further, I adjourn this hearing.

MR. LANIER: Judge, we do have – I'm sorry. [52] There is one other thing that we wanted to file. We've already filed it in the clerk's office this morning. It's something that we've already alluded to both in the – this was the affidavit by my chief

investigator, Clayton Lundy, with the attached copy of the warrant charging Angela Garrett with the cocaine possession.

MR. WYATT: In light of this first affidavit, I have a question to the State.

MR. LANIER: Yes.

MR. WYATT: Either counsel can – this is an affidavit from Clayton Lundy stating that he assisted Doug Pullen and Steve Lanier in the jury selection process. That he, prior to the jury selection, did a background check on several of the black jurors that had been summoned to serve on the jury in the Tim Foster case. My question is: Did Clayton Lundy or anybody else do a background check on the white jurors prior to jury selection?

MR. LANIER: Yes.

MR. WYATT: And was the background check as extensive as the background check on these black jurors?

MR. LANIER: Yes. Judge, they – I wanted to state – one moment, Your Honor. I just wanted to [53] do one bit of argument, if you don't mind, Your Honor.

We've looked over the Batson cases, and I wanted to give some examples that previous cases have ruled in favor of the – or justifying a prosecutor's use of strikes. And these are some examples that are both in the State and Federal decisions, but I think they will

benefit you in your determination, because, simply your role is to determine the credibility of whether or not these reasons were racially neutral. Whether they were specific.

THE COURT: Are you writing these down?

THE LAW CLERK: Yes, sir.

MR. LANIER: And I'll give her a copy of these examples, but you have to – your factual finding, (1.) Has to – it involves credibility, obviously, the credibility of the prosecutor and your past experience with myself. It also applies to the case – the ultimate case to be decided, which we've alleged in this situation to be the death penalty, the case to be tried. It goes into the racially neutral, specific and legitimate reasons. And these are examples of permissible strikes that have been held in U.S. v Love, when a prosecutor stated he removed the sole black venireman because he had [54] heard of a business which was owned by a person who the government expected to be called as an alibi witness for the defendant. I don't think that's applicable, but if a juror had even heard of a business which was owned by a person that was to be a defense witness –

Second, of course, was U.S. v Cartlidge. U.S. v Cartlidge, is, I think – it has an affidavit that I used as a part of my examples when I filed my affidavit. These were some of the reasons: The juror was young, single and unemployed, avoided eye contact with the prosecutor. The juror's brother was convicted of robbery. A juror was divorced and appeared to have a

low-income occupation. The juror knew defense counsel and had worked for an agency the defense counsel had done business with.

THE COURT: Had what? What was that last one?

MR. LANIER: The juror knew defense counsel and had worked for an agency that the defense counsel had done business with. That is U.S. v Cartlidge, 808 Fed 2d, 1064 at 1070.

Also in U.S. v Vaccaro, where a brother of a juror was imprisoned for robbery. Poor attitude in answering voir dire questions, that's Vaccaro. Juror fell asleep during jury selection process, had pre-[55]vious problems with the IRS. Juror's sons had been in trouble with the law; that's U.S. v Forbes, 316 Fed 2d, page 1006. Juror late for court and inattentive. Prosecutor felt this indicated a lack of commitment to the court and to these proceedings, U.S. v Matthews. Juror had grave reservations about the propriety of government tape recording conversations, again, U.S. v Matthews. Defendant was an elected official and a minister. Juror may have been a constituent, and may have attended defendant's church. Government had been criticized by the press; that's U.S. v Woods, 612 Fed 2d, 1483. Juror in advanced stages of pregnancy; that's U.S. v David. Juror was a government employee, and prosecutor believed all government employees tend to be naive. That may be true, but that's still what was the legitimate, specific, neutral reason, U.S. v David. Juror's son on probation. Juror

familiar with the location where the government expected the defendant to claim he had been at the time of the robbery.

The hostile manner with which the juror looked at the prosecutor; that's U.S. v Matthews. Juror struck because of their unemployment, or the fact that they were recently employed; that's Mincy versus the State at 183 Georgia Appeals, page 440.

[56] THE COURT: That's a Floyd County case, isn't it?

MR. LANIER: No, sir, I don't Mincy v State [sic] is. That was a 1987 decision, or '85 decision, but I don't think it's –

THE COURT: No, no. If it's an '85, it's not.

MR. LANIER: Juror did not appear to be particularly interested in or responsive to the selection process. Juror had been involved in a long, drawn out and still ongoing child support case involving the D.A.'s office; that's at Gamble v State. Juror's brother had been prosecuted in the Federal Court on various drug charges; that's Gamble v State. Juror excused because law enforcement officials advised the prosecution that this would not be a good juror for a drug case. That was held to be a legitimate and nondiscriminating. And one juror gave contradictory responses to questions posed by the prosecutor, and that's Henderson v State, 257 Georgia at page 436.

I think it's important for us – for the Court to realize that the amount of time we deliberate in

looking at our strikes and exercising our strikes is important. For the record, of course, this case took – the jury selection was five days. We spent [57] the weekend going over the jury list, and we came in Monday morning ready to strike the jury. So in length of time and the demeanor of the – the demeanor and time taken to make strikes shows a careful process of deliberation, based on many factors and not purely on race. That's U.S. v Matthews, 803 Fed 2d, 325.

The reasons that have specifically been held not to be sufficient, that are not race-neutral, and I think this is the key, the prosecutor's assumption or his intuitive judgment the juror would be partial to a defendant because of their shared race. That's the whole issue of Batson. An excusal of black jurors because defense attorney was black, and prosecutor's past experience showed an affinity between black jurors and an attorney. This was also held to be proper. That's U.S. v Brown, page 17, Fed 2d, at 674.

So these are the types of things, Your Honor, that I want the Court – I know the Court is going to reserve a ruling on this. The Court has listened. We have filed all of our affidavits. The Court knows that we have taken the time and the effort to deliberate over the selection of these jurors. These selections have been applicable to both black and white jurors, as evidenced by testimony and on [58] the affidavit. So we're asking that the Judge's ruling back on April 27th, when you affirmed and felt that the defense had not carried the burden, which the burden is their responsibility. We ask that that decision again to be

affirmed by the Court, and that his motion for a mistrial or a new trial be denied. Thank you.

MR. WYATT: May it please the Court. We disagree with the burden of proof. The burden is initially on the defense to show the racial exclusion, and once we have proved that the racial exclusion, in this case total racial exclusion, then the burden shifts to the State to show that their reason or intent was race neutral. In Batson v –

THE COURT: She's not hearing you. It's hard enough when you're facing us.

MR. WYATT: I'm sorry. In Batson v Kentucky, it clearly places the burden of proof is [sic] on the prosecution. The various quotes from Batson, which I want to read to the Court, at page 1714, Batson states, "Once the defendant raises an inference of prima facie discrimination, the burden shifts to the State to come forward with a mutual [sic] explanation."

At page 1716, "The exclusion of black citizens from service as jurors constitutes a primary example [59] of the evil the Fourteenth Amendment was designed to cure."

At page 1717, the Batson court states, "The defendant has a right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." As Gamble v State points out, "The Court must evaluate the reasons for striking black jurors in light of the explanation for striking black jurors."

Also, page 1717 of the Batson case, Batson states, "That the very idea of a jury is a body composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."

We want you to compare that test to the test which the State sets out in page 5 of its brief. First of all, there are two tests we want you to examine. One of them is the repeated ascertation [sic] that Marilyn Garrett is of low income status, and that was reason for striking her. The second test is, that at page five of the prosecution's brief of this case, the prosecution attempted to exclude any juror who could identify with the defendant and his [60] surroundings. This included age, gender, income status, marital status, the education background, family mental or criminal history, association with psychiatric or deprived children facilities and any other visible circumstantial evidence which could influence the juror to sympathize with the defendant. To allow the State to strike all black jurors, using such tests, we contend would certainly cripple the commitment which Batson make in their [sic] protection clause of the fourteenth amendment to the nondiscriminatory criteria which Batson and Gamble mandates.

However, using this test, which we contend is unconstitutional and improper, the State has kept in every one of this categories, a white juror and struck a black juror, which was put in these categories, without exception. And we contend that even using

this unconstitutional test, the State failed to meet its own test in this situation. We contend that the only consistent criteria which the State used to exclude jurors in this case, and the numbers will show it, is race.

Back to Batson, on page 1718, Batson states that, "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Discrimin-[61]ation within the judicial system is most pernicious because it is a 'stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'"

We also refer to Clemming v Kemp, 790, 4 Fed 2d, 1478. It's an 11th Circuit case, 1966, and we quote from page 1483. It says, "A single and discriminatory governmental act is not immunized by the absence of such discrimination in the making of other decisions." In other words, if the Court just examines this one jury, good or bad acts which have been brought out by or attempted – proffered by the district attorney in previous cases or in hiring a black investigator, does not immunize the State against discrimination in the selection process of this case or any other case.

In this case, the following objective criteria, we contend, was not applied equally to white and black jurors, and in our brief we have laid out the numbers on each one of them, the age of the jurors, the age of the jurors' sons, gender, religion, marital status in

jurors, employment or lack of employment, the criminal record of family members and the knowledge of the jurors – of people with alcohol and [62] drug problems. We also contend that in a couple, the State has used some contradictory and shifting standards. In a couple of cases, they're exactly 180 degrees. One example is on the issue of whether a juror wanted off or not. Hugh Hubbard testified that he wanted off when I examined him. I asked Hugh Hubbard why he wanted off, and Mr. Pullen, for the State, objected. He said that that juror's reason for wanting off was not relevant, was irrelevant to his motive or intent, which was irrelevant to any prejudices or biases which he had in this case. Yet Mr. Lanier, on April the 27th, during the Batson hearing, said that he could strike Eddie Hood because he asked to be off, and he could strike him for that reason alone. So in that case; we have a juror wanting off, on one hand being totally irrelevant and having nothing to do with his prejudices or biases in the case, and on the other hand being the absolute Batson criteria according to the State.

Also, in employment, the State has gone 180 degrees. During the Batson hearing on April 27th, the State stated that they wanted jurors with good employment. In our first Batson brief, the defense pointed out that the State struck two back [sic] jurors [63] who had two jobs each. The reply in the State's Batson brief was that no black jurors served who kept two jobs. Once again, 180 degrees on their criteria. The subjective criteria is hard to check into.

Your Honor, defense counsel are compelled – is compelled to investigate and question and uncover the State's motives in this case, in this case, the counsel for the State, motives. We believe we have done so. We believe in our investigation we have pointed out any inconsistencies and contradictions by the State. It is our contention that we have met the Batson burden of proof; that we have shown that the State has failed to show by a preponderance of the evidence that the reasons for striking all four blacks, which was total exclusion of blacks in the case, the State has failed to show those reasons were race neutral in the case of this jury. Thank you.

MR. LANIER: Your Honor, and for the record he conceded that striking Evelyn Hardge was not a factor – he conceded on the record that he was not contesting the striking of Mrs. Hardge. So, obviously, –

THE COURT: Well the Court remembers in great detail Evelyn Hardge. I don't think either side would [64] have wanted Evelyn Hardge.

MR. LANIER: I agree with you. In his motion that we received, the last one that he filed, he then goes on to say, we should have taken Eddie Hood and Marilyn Garrett rather than the other three jurors. He mentioned Mary Turner in that list. I don't know, but I want the Court to note that under U.S. v Mathews it says, "The defendant bears the ultimate burden of proving intentional discrimination. We do not feel that they have met that burden.

THE COURT: I believe I've said that this hearing was adjourned, how many times?

MR. LANIER: A bunch.

THE COURT: Well, anyway, this is one more time I'm saying it.

* * *

[In the Superior Court of Floyd County]

AFFIDAVIT

(Filed Nov. 24, 1987)

COMES NOW, Clayton Lundy, and under oath states the following:

I, Clayton Lundy, assisted Doug Pullen and Steve Lanier in the jury selection of Tim Foster. Before the jury was selected I did a background check on several of the black jurors who have been summoned to serve on the jury of the Tim Foster case. The check on the jurors was done before, during and upon picking of the jury for the Tim Foster case. My evaluation of the jurors are as follows:

EDDIE HOOD

Mr. Hood lives in a middle-class neighborhood. I think Mr. Hood works at Georgia Kraft, and has been employeed [sic] there for a long period of time. I think he has established himself in the community as being well-known and a good family person. A criminal check reveals that his son has a misdemenaor [sic] conviction for theft by taking. In a non-death penalty case I feel Mr. Hood would be a good juror. However, because of his answers invoirdire [sic] and hesitation concerning the imposition of the death penalty, I recommend that he not be selected in this case.

Since this was a death penalty case, I recommend strongly that Mr. Hood not be selected.

MARY TURNER

Ms. Turner resides in a middle-class neighborhood. Ms. Turner works at North West Georgia Regional Hospital. Ms. Turner is basically a good person and provides for her family. But Mrs. Turner's husband has family members with criminal records. Due to the criminal activities of Ms. Turner's husband's family, with which she has to identify with; I don't think in my opinion, she could be a fair juror in this case. Also, Ms. Turner has stated that she is my half-sister but this is not true.

During the jury selection of Ms. Turner, she answered some of the questions on the questionnaire wrong. She denied having any criminal history in her family or husband's family. Also, during jury selection she stated she was my half-sister, and as I stated before this is not true. My biggest concern was, she never mentioned Otis Turner as having a criminal history or her husband.

Upon picking the jury I recommend that we do not select this juror.

MARILYN GARRETT

Ms. Garrett lives at 306 East 18th Street, which is a low to middle income range neighborhood. She lives in a possible duplex apartment. Mrs. Garrett comes from a neighborhood called Morton Bend, a community near Coosa, Georgia. The community is possibly all related. Ms. Garrett works possibly two

jobs. One job is at Pepperell and the other is at Headstart. Ms. Garrett deals everyday with low income parents and children that live in the projects close to where Tim Foster lived. I advised Mr. Lanier, be very careful in picking Ms. Garrett for a juror in this case due to the case we have on Angela Garrett who lost a teaching and coaching job due to a Cocaine arrest.

During jury selection I observed Ms. Garrett, that she was nervous and short with her answers. I was shocked when Ms. Garrett said that she was not familiar with the North Rome area when she works in this area, possibly two to three blocks away from the area where Mrs. White was killed.

I advised Mr. Lanier not to select Ms. Garrett, due to her relationship with Angela Garrett whom we have warrants on for Violation of Georgia Controlled Substance Act and her affiliation with Head Start.

I, Clayton Lundy, having worked with and knowing Mr. Pullen and Mr. Lanier, each of us knowing the seriousness and penalty of this crime; can honestly state that the strikes used by Mr. Pullen and Mr. Lanier were not racially biased.

/s/ Clayton Lundy
Clayton Lundy, Chief Investigator
District Attorney's Office

Sworn To and Subscribed Before
Me, This 24 day of November, 1987.

/s/ Jackie Fountain
NOTARY PUBLIC

My Commission Expires:
1-1-89

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA

VS.

TIMOTHY TYRONE FOSTER

CRIMINAL ACTION
NO. 86-2218-2

ORDER ON MOTION FOR NEW TRIAL

(Filed Feb. 3, 1988)

This matter having come on regularly to be heard, and after consideration of the arguments, briefs, and transcript in the above-styled case, the Court denies the Defendant's Motion for New Trial.

In his motion, Defendant argues that this Court erred by finding that the District Attorney had exercised the state's peremptory strikes in a racially neutral manner as required by Batson v. Kentucky, 476 U.S. ___, 106 S.C. 1712 (1986).

The Georgia Supreme Court decision of Gamble v. State, 257 Ga. 325, 357 S.E.2d 792 (1987) was rendered on July 9, 1987, after the trial of this case. However counsel on both sides have addressed the strikes in its light in their arguments and briefs on the motion for a new trial.

At trial, the Court found that the Defendant Foster met his burden under *Batson* of showing a prima facie case of purposeful discrimination in selection of the petit jury. This finding was based upon, first, the fact that the Defendant is a member

of a cognizable racial group. Next, that the victim in the case was white, and the defendant Foster is black. Further, that the prosecutor did exercise four of his peremptory strikes against venire members of the Defendant's race, which eliminated the venire members who shared the Defendant's race. However, this Court did not believe that these factors alone were sufficient to constitute a prima facie showing entitling Defendant Foster to an explanation of the state's use of its peremptory challenges to strike black veniremen. The final factor was that, although the Defendant's counsel suggested the peculiar notion at trial that the defense did not have the burden as movant, they did argue to the Court that there were no reasons independent of race for the striking of the four black veniremen. Although the facts argued were not extensive, merely pointing out that none of the four, except Mrs. Hardge, had met or knew the Defendant's family, or had read the local newspaper a great deal, in combination with the previous factors no other particular reason stood out about these potential jurors other than race (except for Mrs. Hardge). Therefore, the Court found that a prima facie showing had been made.

In response to the Court's statement that the burden had shifted to the state, the prosecutor elucidated reasons (Trial Transcript at 1357 – 1377) for the strikes of each of the four black jurors which comported with the mandate in *Batson* for "clear and reasonably specific" explanations of his "legitimate reasons." *Batson*, 106 S.C. at 1723, n. 20. Before

addressing the specific reasons the prosecution gave for each of the contested strikes, some preliminary observations are in order.

Batson instructs that the Equal Protection Clause permits strikes for reasons which are related to the prosecutor's view of the outcome of the case; however a challenge solely due to race is impermissible. *Batson,* 106 S.C. at 1719. This Court evaluated the prosecutor's reasons in light of his stated objective, namely that of obtaining a jury capable of rendering the death penalty. The Court, knowing the nature of the crime and this prosecutor, finds that a completely credible statement.

In addition, voir dire took place from Monday, April 20, 1987 to Friday, April 24, 1987. The actual jury selection occurred on the morning of Monday, April 27, 1987. This means that both the prosecution and the defense had the intervening weekend to carefully assess the prospective jurors. In this particular case, where each veniremen had filled out a five-page questionnaire, and was questioned in voir dire for approximately 30 minutes, clearly both sides had a lot of material to digest in determining their strikes. In light of the obvious attentiveness that the prosecuting attorneys displayed to the answers given on the written questionnaire and during the extensive voir dire, and the lengthy period which was used to determine strikes, the Court believes that the prosecutors involved undertook long and careful assessments based on many factors. This contributes to the Court's view that the prosecutor's use of strikes

was based upon required non-racial grounds. *See* U.S. v. Matthews, 803 F.2d 325, 332 (7th Cir. 1987).

Additionally, the nature of this selection process is one involving many, many aspects of each venireman. The possible permutations are mind-boggling. While each side has marshalled numbers stricken on this or that basis, in point of fact, it is the unique combination of factors that makes a venireman more or less desirable; a comparison in that manner is infinitely more complex than the already complex comparison of many separate attributes among an entire group of people.

Next, the Court notes that the reasons given "need not rise to the level justifying exercise of a challenge for cause." Batson, at 1723. Further, to use the terminology of *Gamble,* the Defendant's prima facie showing was not strong, thus it may be more readily rebutted. *Gamble,* 257 Ga. at 327.

While the defense argues in its brief that the prosecutor indulged in "100 percent discrimination," this is not correct. In *Gamble*, the disparity between blacks and whites was determined by computing the percentage of blacks on the panel of 42, and using that percentage as the basis for assigning a percentage to represent the disparity. Using that method yields 7.1 percent (3/42 = 0.071428571, or 7.1 percent), as the defense has not challenged the state's strike of Mrs. Hardge. This figure is far below the level in *Gamble,* though *Gamble* was almost a worst-case scenario. (If the striking of Mrs. Hardge had

been challenged, the figure would have been 9.5 percent (4/42 = 0.095238095, or 9.5 percent), still far below the 23.8 percent level in *Gamble*.) Further, unlike the prosecutor in *Gamble,* the state in this case offered many legitimate reasons for its strikes of the black jurors.

Moving to the first challenged strike, that of venireman Eddie Hood (venireman number 9):

The defense recounted that venireman Hood read the local paper, knew about the Defendant's earlier escape, but did not know the defense witnesses, the Defendant's family, or the victim's family, and did not think his knowledge about the escape could hurt the state's case [Trial Transcript at 1354].

The prosecution's response, although conceding that Mr. Hood was in the age range wanted, included a welter of factors which rationally militated against choosing this particular juror to sit on the panel. Most persuasive to the Court was, first, that Mr. Hood had a son close to the age of the Defendant who had been convicted of theft-by-taking. *Cf.* U.S. v. Cartlidge, 808 Fed 2d 1064, 1071 (5th Cir. 1987).Further, the facts available indicated that this son lived at home. An apprehension that this would tend to, perhaps only subconsciously, make the venireman sympathetic to the Defendant was a rational one. See U.S. v. Forbes, 816 Fed. 2d 1006. While the defense asserts that the state used different standards for the white jurors, insofar as many of them had children near the age of the Defendant, the

Court believes that the conviction is a distinction that makes the difference. (Venireman Martha Duncan, number 88, the state failed to strike despite her nephew's conviction of armed robbery. The defense argues that this shows shifting standards, however, the Court must disagree. A person's feelings for a son are ordinarily much stronger than for a nephew; one's interest in a person living under one's own roof is ordinarily much stronger than one's interest in someone living in another town.)

This venireman had become ill during voir dire, and had to be hospitalized. While he was available and seemed well on the day of jury selection, it is understandable that the state would not want to take a chance on his continued good health. As it was, one juror was excused after the start of the trial due to illness.

The prosecution stated that Mr. Hood's religion was a factor, too, because their experience in trying death penalty cases (approximately 22 between the two prosecutors trying the case) indicated to them that members of his church, the Church of Christ, were more likely to have difficulty imposing the death penalty. The state also had reservations about Roman Catholics. The Court notes that of those prospective veniremen excused for cause, 12 indicated they would not vote for the death penalty. The numbers here break down as follows:

Three (3) were Roman Catholics.

Three (3) were Methodists.

Two (2) were Church of Christ members.

One (1) was a Baptist.

One (1) identified himself as both Baptist and Methodist.

One (1) was a member of the Church of God.

One (1) had no religious affiliation.

The Court finds very credible the state's concern regarding religious affiliation.

Also, Mr. Hood's wife was a supervisor in the food service department at Northwest Georgia Regional Hospital. The defense planned to set up defenses of mental illness and insanity. The defense argues that this factor does not hold up in light of the strikes of white veniremen; that a white venireman was kept who had been connected with the same hospital in the past. However, the Court is convinced that the same factor may have more or less influence with one individual than with another, depending on the presence or absence of other factors. This is not an unusual concept, and the Court declines to analyze human beings as disconnected parts with disconnected attributes as the defense invites it to do. In any event, knowing ignorance of what kind of exposure and discussions Mr. Hood had with his wife concerning patients there, and what kind of impressions such may have had, the decision to forego the risk is an understandable one. Fortunately, on voir dire counsel cannot watch a videotape of the venireman's entire life before determining strikes. To go into depth about all the areas both sides were concerned about could

literally have taken years. Perfect knowledge is not possible, and if sought, can only lead to disappointment.

Finally, the state believed that Mr. Hood was soft-spoken and slow in responding to the death penalty questions. The Court notes that his particular confusion about the death penalty questions was not unusual. In light of the fact that the death penalty was being sought, however, the Court again finds the state's explanation to be credible. Individuals on this jury were to face a very difficult decision, the state would get no "second bite at the apple," and thus, a desire for "strong jurors" was completely understandable.

The state's peremptory strike of Mrs. Evelyn Hardge (venireman number 22) is not challenged by the defense, and the Court agrees that the state had ample reason to excuse her.

The state's peremptory strike of Mrs. Mary Turner (venireman number 38) has been challenged by the defense. The defense alleges that the state used Mrs. Turner's affiliation with Northwest Georgia Regional Hospital as a "sham" reason, to cover racially discriminatory intent. The Court finds this reason somewhat weak in the particular case of Mrs. Turner; however, in Mrs. Turner's case the prosecution gave other reasons which satisfy the Court that she was struck for race neutral reasons. As the *Gamble* court instructs, a court determining the question at hand "may be less troubled by one relatively weak explanation for

striking a black juror when all the remaining explanations are persuasive than where several of the prosecutor's proffered justifications are questionable." *Gamble*, 257 Ga. at 327.

The district attorney, Stephen Lanier, during the course of this action, has explained that he consulted with Mr. Douglas Pullen, Mr. Clayton Lundy and others to determine his strikes. Mr. Lundy, the state's chief investigator, by his own affidavit and by the district attorney's admission, advised against selecting this particular venireman. Mr. Lundy stated he advised against selecting her because of what he thought her inclinations would be as a result of facts which she conspicuously omitted in her answer to an important question. Specifically, Mrs. Turner answered question number 32 of the questionnaire in the negative. Question number 32 asks:

> Do you have a close friend or relative who has been accused or convicted of a crime of violence? (If so, state the offense, the date of conviction, sentence imposed or if the charges were dismissed.)

The district attorney stated that the prospective juror had a step-brother, Mr. Otis Turner, who had a criminal history. In her affidavit submitted by the defense as Exhibit A to its "Argument" in support of the motion for a new trial, she states that Mr. Turner is her brother-in-law, and that she did not list the charges against him because she "did not interpret burglary convictions as crimes of violence." The state, in its "Brief in Response to Defendant's Batson

Argument for a New Trial," attached an Exhibit B which shows that in May of 1986 Mr. Turner was indicted for aggravated assault (with a baseball bat) and burglary. In September of 1986, a nolle prosequi was entered on this indictment. In addition, the investigator knew that her husband also had a criminal history, and she did not mention him, either. In light of these facts, the investigator did not believe she could be a fair and impartial juror in this case. Under these circumstances, the Court finds credible the state's unease with this venireman.

Further, there appears to be some private disagreement between the prosecutor's chief investigator, Mr. Clayton Lundy, and this venireman. Mrs. Turner claims she and Mr. Lundy are half-brother and half-sister, while Mr. Lundy states in his affidavit that this is not the case. Mr. Lundy actively assisted with the prosecution of this case; this kind of friction could not have been conducive to that prosecution.

The state also expressed concern about eye contact between this venireman and the Defendant. If as a result of this observation the prosecutors believed that there was a certain rapport between this venireman and the Defendant and defense counsel, then, as a strategic matter the state should have struck the venireman as it did. While the defense suggests to the Court that it should "flatly reject" this concern of the prosecution, it declines to do so. *Cf.* U.S. v. Mathews, 803 Fed 2d 325, 331 (7th Cir. 1986). As the defense has related in its brief, Mr. Hood was said to have no eye contact, Mrs. Garrett

looked at the ground, and Mrs. Turner kept eye contact with the Defendant. The defense states that the prosecution has failed to explain the correct way for a venireman to look, and speculates that all that is left is looking at the ceiling. This hyperbole fails to note the obvious: looking at the state's attorneys would be the "correct" way. The defense has insisted that "body language" is important in the selection of a jury (Trial Transcript at 107), and the Court must agree; further, it is just as important to the state as the defense, and the Court rules on that basis.

The final peremptory which the defense challenges is that exercised by the state against Mrs. Marilyn Garrett (venireman number 86). The state indicated that it was "bothered" by her association with Head Start because that program deals with "low-income, underprivileged" children (Trial Transcript at 1375). As the defense counsel informed the Court before voir dire, they were trying to find jurors who possessed some empathy, or could possess some empathy, for the "socially, culturally and educationally deprived life-style" of the Defendant (Trial Transcript at 85 – 89). Given this, the prosecutor's strike was sound.

The state's investigator also recommended that this juror not be selected. Although it is unclear when the district attorney knew the reasons for his investigator's advice, it is clear the investigator believed that Mrs. Garrett's relationship with a Miss Angela Garrett was a cause for concern. Miss Garrett had just recently lost her teaching and coaching job due to

a violation of the Georgia Controlled Substances Act, and the investigator was concerned about this connection.

In addition, the state thought that the venireman's own financial situation might have made her more likely to identify with the Defendant. While the Court believes there is room for disagreement on its likelihood, the Court also believes that the state is honest in voicing its concern that the combination of holding down two jobs and being the divorced mother of two indicates a less stable home enviroment [sic], and acknowledges that that was the prime defense in this case. *Cf. Cartlidge*, 808 Fed. 2d at 1071; Evans v. State, 183 Ga. App. 436, 440 (1987).

Again, the defense's questioning of this prospective juror was abbreviated; that the state took note of that fact and reacted is hardly surprising.

Further, as the district attorney suggested, jury selection can be likened to a game of chess: decisions now affect the existence of options later. The morning of jury selection, Mrs. Powell, venireman number 67, was excused for cause because she had discovered over the weekend that close friends of hers were related to the Defendant, and she could not be fair and impartial. Mrs. Powell had expressed great hesitation over the death penalty. In its brief, the state explained that her excusal changed the dynamics of choosing this jury: venireman Cadle, substituted for venireman Powell, was acceptable to the state. As a result of this movement, one of the state's

planned strikes for jurors was rendered unnecessary. Therefore, the state had an opportunity to be slightly more selective about its "keeps" than it had anticipated.

The state indicates that at this point it had two "questionables" left in the panel, and as far as it knew, one strike left uncommitted: Veniremen Blackmon and Garrett. The state's position is that venireman Blackmon (number 83) was a better choice than venireman Garrett, despite her affiliation with the Catholic church, and her past employment with Northwest Georgia Regional Hospital. (The Court notes that this argument is not invalid because the state used only nine of its 10 strikes. It had reserved a strike for venireman Grindstaff due to her serious reservations about the death penalty. The state could not know in advance that the jury would be selected before she was reached.) In comparing these two, the state noted that Mrs. Blackmon listed her church attendance as "irregular," that her answers on the insanity question were much more favorable to the state's position than Mrs. Garrett's, her home environment appeared more stable (she had been married for over 13 years), and she had no ties to any groups whose purpose was to aid "disadvantaged youth."

In the totality of the circumstances surrounding venireman Garrett, the Court finds credible the prosecuting attorney's position that there was no discriminatory intent, and that there existed reasonably clear, specific, and legitimate reasons for excusal of this prospective juror.

The Defendant's eighth enumeration argues that the Court erred by charging the jury that the Defendant had to prove he was mentally ill beyond a reasonable doubt. However, the case of Spivey v. State, 253 Ga. 187, 188 (1984), is directly on point, and the Court is bound by that case.

Defendant's ninth enumeration of error is the failure to give Defendant's request to charge number 13 on the effect of intoxicants on criminal intent, from Pope v. State, 256 Ga. 196, 208 (1986). The *Pope* case does not stand for the proposition that charges on voluntary intoxication and incapacity to form intent must be given together, which is what the defense seemed to suggest at trial (Trial Transcript at 2441). Indeed, the court in that case was responding to a defendant's argument that such a combination in charge was error because it was "hopelessly contradictory." *Pope*, 256 Ga. at 208. The court in *Pope* found that the combination was not error, and never addressed any question as to whether the combination challenged was required. As this is the case, the Court finds this enumeration without merit.

Wherefore, the Defendant's motion for a new trial is denied.

So ordered this 2nd day of February, 1988.

/s/ John A. Frazier, Jr.
J.S.C., R.J.C.

258 Ga. 736
Supreme Court of Georgia.

FOSTER
v.
The STATE.

No. 45609. | Nov. 22, 1988. | Reconsideration Denied Dec. 14, 1988.

James C. Wyatt, Robert K. Finnell, Rome, for Timothy Tyrone foster [sic].

David L. Lomenick, Jr., Dist. Atty., David J. Dunn, Jr., Scott K. Camp, Asst. Dist. Attys., Stephen F. Lanier, Dist. Atty., Rome, Michael J. Bowers, Atty. Gen., Paula K. Smith, Asst. Atty. Gen., for the State.

MARSHALL, Chief Justice.

This is a death-penalty case. Queen Madge White, a 79-year-old widow, lived by herself in Rome, Georgia. Early in the evening of August 27, 1986, a friend took White to choir practice, and brought her home at 8:30 p.m. White talked to her sister by telephone at 9:00 p.m. and everything was normal. However, when the sister stopped by early the next morning, she discovered that White's house had been broken into and ransacked. The sister called the police, who found White's body lying on the floor in her bedroom covered to her chin by a blanket. Her face was coated with talcum powder. Her jaw was broken. She had a severe gash on the top of her head. She had been sexually molested with a salad-dressing bottle, and strangled to death. A number of her possessions were missing from her home.

The appellant, Timothy Tyrone Foster, was arrested for White's murder a month later when he threatened his live-in companion and she responded by turning him in. The victim's possessions were recovered from their home and from Foster's two sisters. Foster was interrogated and confessed. A jury convicted him of malice murder and burglary, and sentenced him to death. This is his appeal.[1]

1. Foster first contends the trial court erred by excusing one prospective juror and by failing to excuse eight prospective jurors.

Prospective juror Black was excused because of her views against capital punishment. The test for excusal is "whether the juror's views [on capital punishment] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). *See Alderman v. State,* 254 Ga. 206(4), 327 S.E.2d 168 (1985).

Black's answers to questions about the death penalty, like those of many other prospective jurors, were somewhat contradictory. *See Curry v. State,* 255

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[1] The crime occurred August 27, 1986. Foster was arrested September 26 and indicted on October 17, 1986. The case was tried April 20 through May 1, 1987. A motion for new trial was filed May 28, 1987 and heard November 24, 1987. The trial court denied the motion on February 3, 1988. A notice of appeal was filed March 3, 1988, and the case was docketed in this court on March 21, 1988. Oral arguments were heard June 6, 1988.

Ga. 215, 220, 336 S.E.2d 762 (1985). As she pointed out, she had never before been asked to express her views on capital punishment. *See Spivey v. State*, 253 Ga. 187, 197 (fn. 3), 319 S.E.2d 420 (1984). She did state, however, that, although she "maybe" could change her mind, she was opposed to the death penalty, and she stated repeatedly that she would automatically vote for a life sentence in a murder case. The trial court's finding that she was disqualified is not clearly erroneous. *Wainwright v. Witt*, *supra* 469 U.S. at 431, 105 S.Ct. at 856.[2]

Foster contends that prospective juror Tate should have been excused because he initially stated that he would vote automatically to impose a death sentence if the defendant were convicted, and because he had formed an opinion that the police had "probably got the right man" when they arrested Foster. However, it is clear that Tate was confused at first by the question about the automatic imposition of the

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[2] We note that Black gave inconsistent answers to several attempts to ask a question in the exact language of the *Witt* test for excusal. Although the standard enunciated in *Witt* is the test for excusal, it is not necessarily the best or most comprehensible voir dire question. As is noted in *Witt:* "Relevant *voir dire* questions addressed to this issue [of death-qualification] need not be framed exclusively in the language of the controlling appellate opinion; the opinion is, after all, an opinion and not an intricate devise in a will." *Id.* 469 U.S. at 433-34, 105 S.Ct. at 857.

death penalty.[3] Further questioning cleared up the confusion and showed no disqualification in this respect. Compare *Pope v. State,* 256 Ga. 195(7f), 345 S.E.2d 831 (1986). The previously-formed opinion as to guilt was not so "fixed and definite" as to necessitate an excusal for cause. *Childs v. State,* 257 Ga. 243(8), 357 S.E.2d 48 (1987). Tate stated repeatedly that he could set aside his opinion, and decide the case strictly on the evidence. *Spivey v. State, supra* 253 Ga. at 196-7, 319 S.E.2d 420.

Foster also contends that prospective juror Holder should have been excused for his views on the death penalty. Any death-qualification issue here is moot, since this prospective juror was excused on other grounds.

Foster complains of the refusal to excuse six additional prospective jurors on the ground of bias. Some of these prospective jurors knew the victim, but none were close to her, and they all testified that they could be fair and impartial jurors and could decide the case on the evidence presented. The trial court did not err by overruling Foster's challenges for favor. *Wilson v. State,* 250 Ga. 630(4b), 300 S.E.2d 640 (1983).

2. The voir dire examination concluded on a Friday afternoon. The jury was selected Monday

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[3] Tate was not alone. Many of the prospective jurors stated at first that they would vote automatically for *both* a death sentence *and* a life sentence.

morning, giving the parties the weekend to plan their peremptory challenges. The qualified panel from which the jury was selected included four blacks. The district attorney exercised peremptory challenges against each of the four black jurors. Foster timely raised an issue of racial discrimination in the prosecution's exercise of peremptory challenges. *See Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The trial court ruled that a prima facie case had been established, and required the prosecutor to explain his exercise of peremptory challenges. *See Gamble v. State,* 257 Ga. 325(2), 357 S.E.2d 792 (1987). Foster contends the trial court erred by finding that the state successfully rebutted the prima facie case. As we stated in *Gamble* (quoting from *Batson*):

> The [prosecutor's] explanation [of his peremptory challenges] "need not rise to the level justifying exercise of a challenge for cause," but it must be "neutral," "related to the case to be tried," and a "'clear and reasonably specific,' explanation of his 'legitimate reasons' for exercising the challenges." [Cit.]

Gamble, supra at 327, 357 S.E.2d 792.

The defense in this case centered around Foster's deprived background and his use of drugs and alcohol. Many of the defendant's witnesses were social workers. Part of his defense was that when he was a juvenile he had not been committed to a Youth Development Center for the commission of armed robbery,

notwithstanding the contemporaneous recommendation of a psychiatrist that only incarceration and strict discipline could possibly have any "lasting impact" on his anti-social behavior. Instead, he was returned by the state to an unsuitable and harmful family environment which included heavy drug use by his own parents and a girlfriend who "sold [her] body" for cocaine. Foster contended he was mentally ill and, further, that he was involuntarily intoxicated by alcohol, marijuana and cocaine.

The prosecutor was familiar with Foster's background and knew that Foster intended to assert a defense involving mental illness and drug usage. He explained his challenges of the four black prospective jurors as follows, taking them in the order in which they underwent voir dire:

The first juror has a son the same age as the defendant who has been convicted of a misdemeanor theft offense. His wife works at the Northwest Georgia Regional Hospital, a mental health facility. His brother was once a drug consultant. During the *Witherspoon* questioning, the juror appeared to be reluctant to say that he could vote for a death sentence, and he is a member of a church whose members, in the experience of the prosecutor, tend to be very reluctant to impose the death penalty.

The defendant concedes the prosecutor was justified in striking the second juror, who, among other things, had talked to the defendant's mother before entering the courtroom.

The third juror claimed to be the half-sister of the district attorney's chief investigator (who is black). The investigator, however, denied being related in any way to this juror. Moreover, the juror denied having a friend or relative accused or convicted of a crime of violence and denied knowing anyone with a drug or alcohol problem notwithstanding that her brother is a repeat offender whose crimes involve theft by taking, burglary and drugs, and that her husband has been convicted for carrying a concealed weapon.

The fourth juror is a social worker involved with low-income, underprivileged children. Her first cousin was arrested by the Metro Drug Task force on serious drug charges and the cousin lost her job as a consequence.

The prosecutor explained that he did not want social workers on the jury in a death penalty case, as they tended to sympathize with criminal defendants, especially at the penalty phase. Moreover he preferred not to allow on the jury anyone who was closely related to someone with a drug or alcohol problem, since the defendant in this case planned to blame the crime on his own drug and alcohol problem. He further stated that he could not trust someone who gave materially untruthful answers on voir dire, as did the third juror. Finally, he was prepared to challenge peremptorily any juror who was reluctant to impose the death penalty as a matter of conscience where the juror's opposition to the death penalty did

not rise to the level justifying a disqualification for cause.

The prosecutor's explanations were related to the case to be tried, and were clear and reasonably specific. The trial court did not err by finding them to be sufficiently neutral and legitimate. The court's determination that the prosecutor successfully rebutted the prima facie case is entitled to "great deference," *Batson supra*, 106 S.Ct. at 1724 (fn. 21) and is not clearly erroneous in this case.

3. There was no abuse of discretion in the court's conduct of the week-long voir dire examination of prospective jurors. *Childs v. State,* 257 Ga. 243(6), 357 S.E.2d 48 (1987).

4. The trial court did not err by denying Foster's post-trial motion to review *in camera* the state's jury-selection notes. An attorney's work product is generally non-discoverable. A defendant's right to exculpatory evidence under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), is not involved here, and non-exculpatory information in an attorney's work product does not become discoverable simply because the opposing attorneys might find it strategically useful.

5. There was no error in the trial court's denial of funds for expert assistance to examine fingerprints, shoe prints and blood spatters. *Roseboro v. State,* 258 Ga. 39(3), 365 S.E.2d 115 (1988); *Crawford v. State,* 257 Ga. 681(5), 362 S.E.2d 201 (1987).

6. The evidence presented by the defendant in support of his motion for change of venue does not show such an inundation of pretrial publicity as would give rise to a presumption of prejudice. Compare *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir.1985). The voir dire examination and qualification of prospective jurors support the trial court's determination that a change of venue was unnecessary. *Lee v. State*, 258 Ga. 82(9), 365 S.E.2d 99 (1988).

7. On the day the crime was discovered, an investigator equipped with a video camera filmed the crime scene. The resulting videotape depicts the exterior of the victim's home (including the window through which the defendant entered), the path which he apparently took from the house (dropping things along the way and leaving footprints), the interior of the victim's home (and the extent to which it had been ransacked), and, finally, the victim's body (before and after the removal of the blanket covering her).

The trial court overruled Foster's objection that the videotape was inflammatory and duplicative of the still photographs of the scene and of the body which the state also introduced in evidence.

The videotape clearly was relevant. There was no abuse of discretion in the court's ruling. *Hicks v. State*, 256 Ga. 715(13), 352 S.E.2d 762 (1987); *Jones v. State*, 250 Ga. 498(3), 299 S.E.2d 549 (1983).

8. Foster was interrogated by the police on the afternoon of the day he was arrested. Mike Reynolds,

the lead investigator, testified it was "the first time I had ever talked with [Foster] [and] I really didn't expect a confession, [so] I didn't turn any of the video equipment on." However, after being advised of his rights, Foster confessed. Reynolds "didn't want to stop him to go turn everything on," so he let him confess, and this first confession was not recorded.

Reynolds showed Foster the crime scene photographs. Foster denied raping the victim, but admitted molesting her with a salad-dressing bottle. Foster stated that he took the air-conditioner out of one of the bedroom windows, set it on the ground, and entered the house. He found some suitcases and began filling them. He found two pocketbooks and searched them for valuables. The victim woke up and went to the bathroom, without turning on any lights. Then, Foster stated, she returned to her bedroom and, turning on the lamp by her bed, saw the defendant for the first time, in the living room. She came into the living room armed with a knife, and chased Foster around the living room chair. He got a piece of wood from beside the fireplace and hit her on the head. After being hit, she ran to the bedroom and fell to the floor. Foster denied strangling the victim, claiming that he had merely wrapped a sheet around her neck. He admitted dumping white powder on her, "because it cools the body off." He could not explain why he "stuck" the salad-dressing bottle "up her," but he covered her body with a blanket so he would not have to look at her. He left by the back door, and hid

what he had taken in a nearby empty house until he could return for it the next day.

After giving the above statement, Reynolds tried to persuade Foster to confess a second time with the video recording equipment turned on. Reynolds testified Foster "was a little hesitant about confessing a second time." He and detective Craft spent "eight or nine minutes . . trying to talk him into confessing to us a second time." Foster expressed concern that he might not say exactly the same thing the second time. The officers assured him that they were not trying to "trap" or "trick" him, and that "it would be better just to put it on tape and it will be correct." The interview continued:

> Craft: Just tell us again on tape one more time. It ain't going to hurt nothing.
>
> Foster: Why can't we just leave it at that?
>
> Reynolds: If you want to leave it at this and not put it on tape, that is fine with me. Let's just leave it. What this means is that Wayne and I are going to have to sit up all night long and write about you.
>
> Craft: Yeah. But if we put it on tape can't nobody change what the tape says, you know. Okay? This is – this is as much for your benefit as it is ours so let's just go through it right quick one more time and get it over with Okay?
>
> Reynolds: Tim, I haven't lied to you through the whole night, and I haven't tried

> to trick you through the whole night, and I am not trying now. [Y]ou [sat] in here and told two police officers everything about it. I am not trying to push you or bluff you or anything. It will just make it a lot easier on all of us.

> Craft: Tim, let's go ahead and get this thing over with tonight. You told us about it already one time. Okay? Hey, let's run back through it right quick and get it over with and be done with it. Okay? Do you want to do that? It ain't going to hurt, not a thing.

> Craft: [Y]ou told us about it one time already. It ain't going to hurt, you know. I mean I think you will agree that it ain't going to hurt, you know, for us to run back through it again right quick.

Thus encouraged, Foster was interviewed a second time on videotape. His second confession was identical in all material respects with the first.

(a) Foster contends first that his confessions were induced by a "hope of benefit," OCGA § 24-3-50, because he was informed that he would not be charged with rape. There is no merit to this contention. Foster was simply told that no rape would be charged, based on his statement that no rape occurred. No benefit was offered to induce a confession.

(b) Foster contends further that it was error to admit the second statement in evidence because it was elicited only after he was told repeatedly that it was not going to hurt "a thing," and that it would be "as much for your benefit as ours." We agree. An accused must be warned that anything he says can and will be used against him in court. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Telling him that a confession is not going to hurt and, on the contrary, will benefit him as much as the police, is not consistent with the warnings required by *Miranda*.

Nevertheless, there is no reversible error. The videotaped confession was merely cumulative to the first, non-recorded confession, and that confession and the remaining evidence overwhelmingly establish Foster's guilt. Any error here is harmless beyond a reasonable doubt. *Vaughn v. State*, 248 Ga. 127(2), 281 S.E.2d 594 (1981).

9. A defense psychiatrist testified that Foster was so intoxicated from the ingestion of alcohol, marijuana and cocaine that he did not know the difference between right and wrong at the time of the crime. He also testified that Foster has an anti-social personality disorder, but that when he is sober he is neither insane nor mentally ill under Georgia law.

On cross-examination, the prosecutor asked the psychiatrist if it was true that most people in prison have an anti-social personality disorder. The psychiatrist agreed that it was true. Then the state asked:

> So any one of those people that took cocaine and marijuana and beer in the quantities by his story that you say that this defendant took it, would be entitled to walk out of the courtroom as found acquitted on the basis of insanity. Is that what you're saying?

Foster objected and moved for a mistrial. The trial court denied the mistrial, but sustained the objection and instructed the jury to disregard the question. The court did not err by refusing to declare a mistrial.

10. The court charged on voluntary and involuntary intoxication as follows:

> Our law provides that voluntary intoxication shall not be an excuse for any criminal act. It provides further that if a person's mind when unexcited by intoxicants is capable of distinguishing between right and wrong and reason and acting rationally, and he voluntarily deprives himself of reason by consuming intoxicants and while under the influence of such intoxicants, he commits a criminal act, he is criminally responsible for such act to the same extent as if he were sober. Whether or not the defendant was voluntarily intoxicated at or during the time alleged in this indictment is a matter solely for you, the jury, to determine.
>
> A person shall not be found guilty of a crime when, at the time of the conduct constituting the crime, the person, because of involuntary intoxication, did not have sufficient mental

> capacity to distinguish between right and wrong in relation to the criminal act.
>
> Involuntary intoxication means intoxication caused by (a) consumption of a substance through excusable ignorance, or (b) the coercion, fraud, artifice or contrivance of another person.

These instructions set forth the principles contained in OCGA § 16-3-4.

Foster contends the court erred by refusing his request to charge in addition:

> If, because of the influence of alcohol, drugs, or narcotics, one's mind becomes so impaired as to render him incapable of forming an intent to do the act charged, or to understand that a certain consequence would likely result from it, he would not be criminally responsible for the act.

The law of intoxication contained in OCGA § 16-3-4 must be read in light of OCGA § 16-3-2, which provides:

> A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission or negligence.

OCGA § 16-3-4 limits the reach of OCGA § 16-3-2 so that the inability to distinguish between right and wrong is *not* a defense if the inability is a consequence of voluntary intoxication (but remains a

defense if the inability is a consequence of *in*voluntary intoxication).

Neither code section speaks of an inability *to form an intent* to commit the act. Persons are not excused from criminal liability under either of these code sections because they are incapable of forming criminal intent. As we observed in *Pope v. State,* 256 Ga. 195 at 208, 345 S.E.2d 831 (1986), a person can be capable of forming an intent to kill but incapable of understanding the difference between right and wrong.[4] Lack of intent is a defense, but it is not implicated by either OCGA § 16-3-2 or OCGA § 16-3-4. In *Jones v. State,* 29 Ga. 594(2) (1860), this court explained:

> [T]he minimum of mind which can furnish the necessary mental element in crime, is a far smaller quantity than was claimed by the argument for the accused.
>
> > Whoever has mind enough to form the simple intention to kill a human being, has mind enough to have malice, and to furnish the mental constituents of murder.
> >
> > And this brings [us] to a consideration of the great perversions which have been made of the doctrine that

---

[4] Foster's own psychiatrist testified that although Foster was incapable of distinguishing between right and wrong at the time of the crime, he *was* capable of forming the intent to do the acts he committed.

drunkenness is no excuse for crime. The foundation stone of these perversions, not distinctly shaped in the argument, but unconsciously assumed in it, is a feeling or notion that the exemption of insane persons and young children from criminal responsibility, is not the result of positive law excusing them, but is the simple consequence of their mental deficiency, which is supposed to be so complete as not to be capable of furnishing the mental element of crime; while the drunken man, with the same actual mental deficiency, is held responsible for his actions, not because they are crimes having the mental and physical element of crime, but by virtue of a certain *destructive* capacity infused into him, from reasons of policy, by the law which declares that drunkenness shall be no excuse for crime. The reverse of all this is the true philosophy of the law. The law deals with all of these classes of people, as having a sufficient quantum of mind to have bad passions, and evil intentions, and carelessness in their actions, and so to furnish the mental element of crime, but as laboring also under an infirmity of reason, which serves to betray them into these evil intentions and carelessness, and at the same time breaks

> down this power of resisting temptation. The law comes in then, and excuses the young and the insane, out of tenderness towards an infirmity which is involuntary, and at the same time, to guard against the possibility that men might make the same excuse whenever there is the same infirmity of reason, the law takes special care to exclude drunken men from the excuse, because their infirmity is voluntary.
>
> The result is, that the young and the involuntarily insane occupy a platform of their own, by virtue of an exception made in their favor, while the voluntary insanity of drunkenness being excluded from the exception, stands just as if no exception had been made, and the drunk man and sober man occupy the same great platform of responsibility for the crimes which they commit.

Id. at 609-10.

Foster's requested charge is misleading, because it implies that the intoxication defense involves a lack of intent to commit the crime, when intent is, in fact, a separate issue.

The trial court charged on intent, including the state's burden to prove intent beyond a reasonable doubt. The court did not err by refusing to give in addition the defendant's requested charge on inability

to form intent as a result of intoxication. *Gilreath v. State,* 247 Ga. 814(13), 279 S.E.2d 650 (1981).

11. "The statutory provision that mental illness be proved beyond a reasonable doubt is not constitutionally infirm. [Cit.]" *Spivey v. State,* 253 Ga. 187, 189, 319 S.E.2d 420 (1984).

12. The state urged the presence of two statutory aggravating circumstances at the sentencing phase of the trial: (1) the murder was committed while the offender was engaged in the commission of burglary, and (2) the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. OCGA § 17-10-30(b)(2) and (b)(7). The court's charge included an instruction that if the jury should find the § b(7) circumstance, its verdict should specify which of the three elements of § b(7) – torture, depravity of mind, or an aggravated battery – the jury found. *See West v. State,* 252 Ga. 156, 162 (Appendix), 313 S.E.2d 67 (1984).

A type-written verdict form was submitted to the jury as follows:

> The following aggravated circumstances as to Murder has [sic] been submitted by the State of Georgia and must have been proved to the satisfaction of the jury beyond a reasonable doubt before a verdict recommending the death penalty is authorized, to wit.

1. The offense of murder was committed while the offender was engaged in the commission of Burglary.

2. The offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.

The jury will answer the following questions:

1. Did you find beyond a reasonable doubt the aggravated circumstances to exist as to the murder?

2. If so, write the aggravated circumstances below as to murder.

3. As to murder: (A) We the jury recommend the death penalty. YES ( ) NO ( )

B. We the jury recommend Life Imprisonment. YES ( ) NO ( )

The jury filled in the form by writing "yes" after the first question, and by writing after the second question:

Torture – powdered body, eyes & nose, salad bottle in vagina, strangulation

Depravity of mind – powdered body, salad bottle in vagina, strangulation

Aggravated battery – hit with stick (log) disfigured face, strangulation

Finally, the jury checked "yes" to 3(A) and drew a line through 3(B).

The jury convicted Foster of burglary and answered "yes" to the question whether it had found beyond a reasonable doubt the proffered "aggravated circumstances" (plural), one of which was burglary. However, the jury failed to list burglary in the space provided under the second "question" Although it is likely that the jury meant to find that the commission of the offense of burglary was a statutory aggravating circumstance of the murder, we cannot be sure that the jury intended to do so, and we shall not consider burglary as a statutory circumstance supporting the imposition of a death sentence. OCGA § 17-10-30(c).

That leaves the § b(7) circumstance. Since no one at trial objected to the form of the verdict, the question here is not whether the form of the verdict might be objectionable, but whether "the jury's intent [was] shown with sufficient clarity that this court can rationally review the jury's finding." *Romine v. State,* 251 Ga. 208, 213, 305 S.E.2d 93 (1983). We are satisfied that the jury intended to find the § b(7) circumstance in its entirety and to follow the trial court's instructions by specifying in particular that it had found each of the three principal elements of § b(7). *See Hance v. State,* 245 Ga. 856(3), 268 S.E.2d 339 (1980).

The evidence showed that Foster hit the victim with a fireplace log hard enough to break her jaw, sexually molested her, poured talcum powder all over her face, and then strangled her to death. The jury's § b(7) finding is supported by the evidence. OCGA

§ 17-10-35(c)(2). Compare *Phillips v. State,* 250 Ga. 336(6), 297 S.E.2d 217 (1982).

13. The death sentence was not imposed under the influence of passion, prejudice or other arbitrary factor, and is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. OCGA § 17-10-35(c)(1) and (c)(3). The similar cases listed in the Appendix support the imposition of a death sentence in this case.

JUDGMENT AFFIRMED.

All the Justices concur.

APPENDIX

Blankenship v. State, 258 Ga. 43, 365 S.E.2d 265 (1988); *Crawford v. State,* 257 Ga. 681, 362 S.E.2d 201 (1987); *Parker v. State,* 256 Ga. 543, 350 S.E.2d 570 (1986); *Devier v. State,* 253 Ga. 604, 323 S.E.2d 150 (1984); *Allen v. State,* 253 Ga. 390, 321 S.E.2d 710 (1984); *Felker v. State,* 252 Ga. 351, 314 S.E.2d 621 (1984); *Brown v. State,* 250 Ga. 66, 295 S.E.2d 727 (1982); *Messer v. State,* 247 Ga. 316, 276 S.E.2d 15 (1981); *Justus v. State,* 247 Ga. 276, 276 S.E.2d 242 (1981); *Green v. State,* 246 Ga. 598, 272 S.E.2d 475 (1980); *Cape v. State,* 246 Ga. 520, 272 S.E.2d 487 (1980); *Thomas v. State,* 245 Ga. 688, 266 S.E.2d 499 (1980); *Gates v. State,* 244 Ga. 587, 261 S.E.2d 349 (1979); *Brooks v. State,* 244 Ga. 574, 261 S.E.2d 379

(1979); *Collins v. State,* 243 Ga. 291, 253 S.E.2d 729 (1979); *Davis v. State,* 242 Ga. 901, 252 S.E.2d 443 (1979); *Johnson v. State,* 242 Ga. 649, 250 S.E.2d 394 (1978); *Moore v. State,* 240 Ga. 807, 243 S.E.2d 1 (1978); *Gibson v. State,* 236 Ga. 874, 226 S.E.2d 63 (1976).

RESPONDENT
EXHIBIT
170

[In the Superior Court of Butts County]
STATE OF GEORGIA
COUNTY OF FLOYD

AFFIDAVIT OF STEPHEN LANIER

Comes now the affiant, Stephen Lanier, who being first duly sworn by an officer authorized by law to administer oaths, states the following:

1.

My name is Stephen Lanier and I am over 18 years of age. This affidavit is made upon my personal knowledge and I am competent to testify to the matters set forth herein.

2.

I am an attorney currently in private practice. At the time of Timothy Foster's death penalty trial, I was the District Attorney for the Rome Judicial Circuit.

3.

I have reviewed the highlighted jury venire list from the District Attorney's Office in Rome, Georgia, which is attached as Exhibit A. I did not make any of

the highlighted marks on the jury venire list. It was common practice in the office to highlight in yellow those jurors who had prior case experience. I did not instruct anyone to make the green highlighted marks.

4.

I reaffirm my testimony made during the motion for new trial hearing as to how I used my peremptory jury strikes and the basis and reasons for those strikes.

FURTHER AFFIANT SAYETH NOT

Executed this 26 day of October, 2006.

/s/ Stephen Lanier
STEPHEN LANIER

Sworn and subscribed before me,
This 26 day of October, 2006.

/s/ Patricia Lea Stepp
Notary Public

My commission expires 7-19-06.

RESPONDENT
EXHIBIT
171

[In the Superior Court of Butts County]
STATE OF GEORGIA
COUNTY OF MUSCOGEE

AFFIDAVIT OF DOUGLAS C. PULLEN

Comes now the affiant, Douglas C. Pullen, who being first duly sworn by an officer authorized by law to administer oaths, states the following:

1.

My name is Douglas C. Pullen and I am over 18 years of age. This affidavit is made upon my personal knowledge and I am competent to testify to the matters set forth herein.

2.

I am currently a Superior Court Judge in the Chattahoochee Judicial Circuit. At the time of Timothy Foster's death penalty trial, I was a [sic] Assistant District Attorney for the Chattahoochee Judicial Circuit. I, along with Steve Lanier, represented the State at trial in the prosecution of Timothy Foster.

3.

Steve Lanier and I picked the jury for Timothy Foster's criminal trial in 1987. I have reviewed the highlighted jury venire list from the District Attorney's file in Rome, Georgia, which is attached as Exhibit A. I did not make any of the highlighted marks on the jury venire list, and I did not instruct anyone else to make the highlighted marks.

4.

I did not rely on the highlighted jury venire list in making my decision on how to use my peremptory jury strikes.

FURTHER AFFIANT SAYETH NOT

Executed this 25 day of October, 2006.

/s/ Douglas C. Pullen
DOUGLAS C. PULLEN

Sworn and subscribed before me,
This 25 day of October, 2006.

/s/ Patricia S. Colbert
Notary Public

My commission expires October 5, 2009

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

TIMOTHY TYRONE FOSTER, Petitioner,	*	
v.	*	Habeas Corpus Civil Action File No. 1989-V-2275
CARL HUMPHREY, WARDEN, Georgia Diagnostic and Classification Prison,	*	
Respondent.	*	

ORDER DENYING PETITIONER'S REQUEST FOR HABEAS RELIEF

After consideration of the record, applicable law, the briefs, arguments, and evidence submitted by the parties, and after having held an evidentiary hearing in this matter, this court finds and orders as follows:

Petitioner, Timothy Tyrone Foster, was convicted by a jury in the Superior Court of Floyd County of one count of malice murder and one count of burglary on May 1, 1987. The Petitioner was thereafter sentenced to death for the malice murder of Queen Madge White. In addition to the death sentence, the trial court sentenced Petitioner to twenty years for burglary.

On direct appeal, the Georgia Supreme Court affirmed Mr. Foster's convictions and death sentence. *Foster v. State,* 258 Ga. 736 (1988). Mr. Foster's Motion for Reconsideration was denied. The United

States Supreme Court denied certiorari. *Foster v. Georgia,* 490 U.S. 1085 (1989); *rehearing denied* 492 U.S. 928 (1989). Mr. Foster then filed a petition for a writ of habeas corpus in this court. In response, the court granted a limited remand for a mental retardation trial and held the remainder of the petition in abeyance. At the mental retardation trial, which was held in Floyd County in 1999, the jury found that Mr. Foster was not mentally retarded. Mr. Foster's Motion for New Trial was denied by the trial court. On appeal, the Georgia Supreme Court affirmed. *Foster v. State,* 272 Ga. 69, 525 S.E.2d 78 (2000). The United States Supreme Court denied certiorari. *Foster v. Georgia,* 531 U.S. 890 (2000); *rehearing denied* 531 U.S. 1045 (2000).[1]

After the mental retardation trial, Mr. Foster amended the remainder of his habeas petition several times, and this court held an evidentiary hearing on October 30-31, 2006, see Hearing Transcript, pages 1-169. At the hearing, the court received evidence in the

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[1] The Following abbreviations are used in citations throughout this order:

"1987 R" – record on appeal from Petitioner's trial

"1999 R" – record from mental retardation trial

"MNT" – Motion for New Trial

"HT" – habeas transcript (followed by volume number)

"TT" – trial transcript

"M.R. Trial" – mental retardation trial transcript

"Pet. PHB" – Petitioner's post-hearing brief

form of live testimony, affidavits, deposition transcripts, and other exhibits. The court then invited the parties to submit written objections, post-hearing briefs, and proposed final orders.

Petitioner's Objection to State's Exhibits

Both parties filed written objections. On May 17, 2010, Mr. Foster objected to the admission of 145 exhibits introduced by the State for lack of authentication. The State did not respond to Mr. Foster's objection. The court has reviewed Mr. Foster's objection and the submitted exhibits, and in exercising its broad authority to admit such evidence, has decided to overrule the Petitioner's objection and admit the State's exhibits.

Respondent's Objection to Petitioner's Affidavits

On July 16, 2010, the State objected to several of the affidavits filed by Mr. Foster on grounds such as relevance, speculation, and hearsay. On August 16, 2010, Mr. Foster responded to the State's objections. The court agrees that the State's objections go to the weight, not the admissibility, of the affidavits. See *McElroy v. Williams Bros. Motors,* 104 Ga. App. 435, 437 (1961) ("A judge [sitting without a jury] is not held to the strict rules as to the admission of evidence, and [is] presumptively able to 'sift the wheat from the chaff' "). The court further agrees that the standard practice in Georgia is for habeas corpus courts to admit affidavits into evidence pursuant to

O.C.G.A. § 9-14-48(a). Accordingly, Mr. Foster's affidavits in support of his Petition are admitted in their entirety.

Respondent's Motion to Permit the Submission of Affidavit Testimony for Purposes of Clarification Following the Close of Evidence

Also on July 16, 2010, the State filed a Motion to Permit the Submission of Additional Affidavit Testimony. Mr. Foster opposed the motion. Given the untimeliness of the State's submission, this court denies the State's Motion to Permit the Submission of Additional Affidavit Testimony. See *State v. Sabillon,* 280 Ga. 1, 2 (2005) (holding that the habeas court properly excluded an affidavit submitted by the petitioner after the statutory deadline).

Claims not Reviewable Due to Res Judicata

As a preliminary matter, this court notes that, as cited by the Respondent, the following claims are not reviewable based on the doctrine of res judicata, as the claims were raised and litigated adversely to Petitioner on his direct appeal to the Georgia Supreme Court. *Gunter v. Hickman,* 256 Ga. 315 (1986); *Roulain v. Martin,* 266 Ga. 353 (1996).

- Claim XVII of the amended petition dated 1/4/02, Claim XVII of the amended petition dated 1/26/04 and Claim I of the amended petition dated 7/10/06, wherein Petitioner alleges that the State used peremptory challenges in a racially

discriminatory manner in violation of *Batson v. Kentucky,* (*see Foster v. State,* 258 Ga. at 737-739(2));

- Claim I of the amended petition dated 1/4/02, Claim I of the amended petition dated 1/26/04 and Claim III of the amended petition dated 7/10/06, wherein Petitioner alleges that he is mentally retarded and therefore ineligible for the death penalty. (See *Foster v. State,* 272 Ga. at 70(1));

- Claim X of the amended petition dated 1/4/02, Claim X of the amended petition dated 1/26/04 and that portion of Claim V of the amended petition dated 7/10/06, wherein Petitioner alleges that the trial court violated his constitutional rights by failing to provide him with the necessary assistance of competent and independent experts that included expert assistance to examine fingerprint, shoe print and blood spatter evidence. (See *Foster v. State,* 258 Ga. at 739(5));

- That portion of Claim VI of the amended petition dated 7/10/06, wherein Petitioner alleges that the prosecutor suppressed evidence of the State's use of racial stereotypes in selecting a jury in violation of *Brady v. Maryland,* (*see Foster v. State,* 258 Ga. at 739(4));

- Claim VII of the amended petition dated 7/10/06, wherein Petitioner alleges that his statements to the police were illegally obtained in violation of his constitutional rights. (See *Foster v. State,* 258 Ga. at 740-742(8));

- The portion of Claim VIII of the amended petition dated 7/10/06, wherein Petitioner alleges that the trial court erred in admitting the videotape of the scene that the police made the day after the crime. (See *Foster v. State,* 258 Ga. at 740(7));

- Claim XIV of the amended petition dated 7/10/06, wherein Petitioner alleges that the trial court erred in failing to change venue for Petitioner's trial due to the pretrial publicity surrounding the case and the exposure that numerous jurors had to the publicity. (See *Foster v. State,* 258 Ga. at 740(6));

- Claim XXII of the amended petition dated 1/4/02, Claim XXIII of the amended petition dated 1/26/04 and Claim XV of the amended petition dated 7/10/06, wherein Petitioner alleges that his constitutional rights were violated by the trial court's restrictions on voir dire. These alleged trial court restrictions include the following:

  1) limiting the voir dire of jurors' views on capital punishment and/or their ability to set aside their personal feelings and be impartial, including the voir dire of Myrtle Francis, Ray Tate and Hugh Hubbard;

  2) limiting voir dire regarding jurors' ability to impartially receive the testimony from police officers;

  3) limiting voir dire on jurors' ability to consider and weigh mitigating evidence at the penalty phase;

4) limiting voir dire on jurors' biases and prejudices against individuals who come from a different cultural, economic or social background;

5) limiting voir dire on jurors' views about race, the appropriateness of the death penalty for minors, and youth as a potentially mitigating circumstance; and

6) limiting voir dire on jurors' views, biases and prior knowledge regarding insanity, mental illness, and drug and alcohol abuse;

To the extent this claim asserts that the trial court erred by allegedly not allowing Petitioner to ask questions during voir dire as to attitudes, race, youth, insanity and mental illness, this claim was addressed and decided adversely to Petitioner on direct appeal. See *Foster v. State,* 258 Ga. at 739(3). To the extent Petitioner asserts any other restrictions by the trial court on voir dire, it is procedurally defaulted;

- Claim V of the amended petition dated 1/4/02, Claim V of the amended petition dated 1/26/04 and Claim XVI of the amended petition dated 7/10/06, wherein Petitioner alleges that the trial court improperly failed to excuse jurors for cause who showed a clear bias against Petitioner. These jurors include the following: Mr. Ratliff; Ray Allen Tate; Billy Graves; James T. Cochran; Dorsey Hill; Charles Haulk; Elbert J. Roberson; Linda Kay Fincher; John William Hoban; Margaret Hibbert; Robert Milan; Shirley Jackson; Hugh Hubbard; Pamela Hyde; Leslie Hatch; Virginia Berry; Robert Summners; Walter Fuqua; and A.D. Branton. This claim was addressed and

decided adversely to Petitioner on direct appeal. See *Foster v. State*, 258 Ga. at 736-737(1). To the extent that this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default. This court finds that the Petitioner has not met his burden in showing cause and actual prejudice or miscarriage of justice on this issue to overcome default.

- Claim VI of the amended petition dated 1/4/02, Claim VI of the amended petition dated 1/26/04 and Claim XVII of the amended petition dated 7/10/06, wherein Petitioner alleges that the trial court erred in excusing for cause jurors whose views on the death penalty were not extreme enough to warrant exclusion. These jurors include the following: Juror Hines; Dorothy Black; Beverly Kay Richardson; Scott Henson, Jr.; Michael Steve Green; and Lewis Nixon. This claim was addressed and decided adversely to Petitioner on direct appeal. See *Foster v. State*, 258 Ga. at 736-737(1). To the extent that this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default. This court finds that the Petitioner has not met his burden in showing cause and actual prejudice or miscarriage of justice on this issue to overcome default.

- Claim XXIX of the amended petition dated 1/4/02, Claim XXX of the amended petition dated 1/26/04 and Claim XIX of the amended petition dated 7/10/06, wherein Petitioner alleges that he was tried under a statute that mandated he prove his mental illness beyond a reasonable doubt before the jury would be authorized to find him guilty but mentally ill in violation of his constitutional rights. (See *Foster v. State,* 258 Ga. at 745(11));

- Claim XIV of the amended petition dated 1/4/02, Claim XIV of the amended petition dated 1/26/04 and Claim XXIV of the amended petition dated 7/10/06, wherein Petitioner alleges that the death penalty constitutes cruel and unusual punishment in Georgia in that it is applied in an arbitrary and capricious fashion and pursuant to a pattern and practice of Georgia prosecuting authorities, courts and juries to discriminate on grounds of race, sex and poverty. (See *Foster v. State,* 258 Ga. at 747(13));

- Claim XI of the amended petition dated 1/4/02, Claim XI of the amended petition dated 1/26/04 and that portion of Claim XXV of the amended petition dated 7/10/06, wherein Petitioner alleges that his death sentence is disproportionate. (See *Foster v. State,* 258 Ga. at 747(13)); and

- Claim XL of the amended petition dated 1/4/02, Claim XLI of the amended petition dated 1/26/04 and Claim XXX of the amended petition dated 7/10/06, wherein Petitioner alleges that the trial

court erred in failing to change venue for Petitioner's mental retardation trial. (See *Foster v. State,* 272 Ga. at 70(2)).

Claims that are Procedurally Defaulted

This Court finds that Petitioner failed to raise the following claims on direct appeal and has failed to establish cause and actual prejudice, or a miscarriage of justice, sufficient to excuse his procedural default of these claims. *Black v. Hardin,* 255 Ga. 239 (1985); *Valenzuela v. Newsome,* 253 Ga. 793 (1985); O.C.G.A. § 9-14-48(d).

- Claim II of the amended petition dated 7/10/06, wherein Petitioner alleges that he was denied his right to a fair trial, an impartial jury, due process, and equal protection as a result of the prosecution's repeated attempts to rely on arguments supported by racial stereotypes;
- Claim III of the amended petition dated 1/4/02 and Claim III of the amended petition dated 1/26/04, wherein Petitioner alleges that the State destroyed unidentified potentially exculpatory evidence, including allegations that the State, through its investigating officers confiscated unidentified critical evidence that was never tested and then allegedly either lost or destroyed;
- Claim IV of the amended petition dated 1/4/02 and Claim IV of the amended petition dated 1/26/04, wherein Petitioner alleges that he was tried while incompetent, specifically that he allegedly suffered mental illnesses that prevented

him from "rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands." This Court finds this claim is procedurally defaulted to the extent that Petitioner seeks to assert that under Pate v. Robinson, 383 U.S. 375 (1966), the trial court should have sua sponte ordered a competency hearing and to the extent Petitioner seeks to assert a substantive competency claim, that he was actually incompetent at the time of trial and therefore should not have been tried;

- That portion of Claim V of the amended petition dated 7/10/06, wherein Petitioner alleges that Dr. Laipple was not an independent defense expert and that the trial court erred in not providing him with a psychologist or social worker, an expert on mental retardation and a forensic pathologist;

- Claim II of the amended petition dated 1/4/02, Claim II of the amended petition dated 1/26/04 and that portion of Claim VI of the amended petition dated 7/10/06, wherein Petitioner alleges that the prosecutor suppressed material exculpatory evidence in violation of Brady v. Maryland, including evidence of the involvement of other individuals in the crime and evidence concerning the reward given to Sam Stubbs in exchange for his and Lisa Stubbs' cooperation with the State;

- Claim XVI of the amended petition dated 1/4/02, Claim XVI of the amended petition dated 1/26/04 and that portion of Claim VIII of the amended petition dated 7/10/06, wherein Petitioner alleges

that the trial court erred in admitting photographs taken of the victim prior to the autopsy and photos from the crime scene;

- Claim IX of the amended petition dated 7/10/06, wherein Petitioner alleges that the State presented testimony it knew or reasonably should have known was perjured, including the testimony provided by Lisa Stubbs wherein she stated that she did not benefit from her testimony;

- Claim XVIII of the amended petition dated 1/4/02, Claim XVIII of the amended petition dated 1/26/04 and Claim X of the amended petition dated 7/10/06, wherein Petitioner alleges that the prosecutor made impermissible and prejudicial arguments during the guilt phase of Petitioner's trial in that the prosecutor:

  1) improperly shifted the burden of proof to Petitioner on the essential elements of the offenses;

  2) improperly commented upon Petitioner's failure to testify;

  3) improperly vouched for the credibility of his witnesses;

  4) improperly emphasized irrelevant, inflammatory and prejudicial evidence;

  5) improperly testified and misstated the evidence;

  6) improperly took advantage of Petitioner's lack of funds to properly investigate possible guilt/innocence defenses;

7) improperly impugned the performance of Petitioner's counsel;

8) improperly stated and argued the law applicable to Petitioner's case;

9) improperly suggested that the jury had a duty to return a guilty verdict to prevent further deaths;

10) improperly appealed to the passion and prejudice of the jury, and;

11) improperly argued similar transactions evidence;

- Claim XXX of the amended petition dated 1/4/02, Claim XXXI of the amended petition dated 1/26/04 and Claim XI of the amended petition dated 7/10/06, wherein Petitioner alleges that the prosecutor made improper argument at the penalty phase in that the prosecutor:

  1) argued facts not in evidence;

  2) offered his opinion;

  3) argued an incorrect law on the role of mitigation;

  4) appealed to racial stereotypes;

  5) argued that jurors should treat Petitioner adversely because he exercised his constitutional rights;

  6) argued an escape although no evidence of escape was admitted at either phase of the trial, and;

7) equated a guilty but mentally ill verdict with acquittal;

- Claim XII of the amended petition dated 1/4/02, Claim XII of the amended petition dated 1/26/04 and Claim XII of the amended petition dated 7/10/06, wherein Petitioner alleges that he was either constructively or actually absent from proceedings at which critical issues were determined;

- Claim XXVI of the amended petition dated 1/4/02, Claim XXVII of the amended petition dated 1/26/04 and Claim XIII of the amended petition dated 7/10/06, wherein Petitioner alleges that Dr. Hark was allowed to testify without Petitioner making a knowing and intelligent waiver of the psychologist/patient privilege;

- Claim XIII of the amended petition dated 1/4/02 and Claim XIII of the amended petition dated 1/26/04, wherein Petitioner alleges that the Unified Appeal Procedure is unconstitutional;

- Claim XIX of the amended petition dated 1/4/02, Claim XIX of the amended petition dated 1/26/04 and Claim XVIII of the amended petition dated 7/10/06, wherein Petitioner alleges juror misconduct during the original trial. This misconduct included the following:

  1) improper consideration of matters extraneous to the trial;

  2) improper racial animus which infected the deliberations of the jury;

3) false or misleading responses of jurors on voir dire;

4) improper biases of jurors which infected their deliberations;

5) improper communications with third parties;

6) improper ex parte communications with the trial judge; and

7) improperly prejudging the guilt/innocence and penalty phases of Petitioner's trial;

8) improper exposure to the alleged prejudicial opinions of third parties;

- Claim XXIII of the amended petition dated 7/10/06, wherein Petitioner alleges that his execution would violate the Eighth Amendment even if he does not meet the traditional definition of mental retardation because of the combination of his lack of cognitive ability and his age at the time of the offense;

- Claim XXIII of the amended petition dated 1/4/02 and Claim XXIV of the amended petition dated 1/26/04, wherein Petitioner alleges that the grand jury and the grand jury foreman were discriminatorily selected;

- Claim XXIV of the amended petition dated 1/4/02 and Claim XXV of the amended petition dated 1/26/04, wherein Petitioner alleges that the grand jury which returned the indictment against Petitioner engaged in unidentified misconduct, considered unidentified extrinsic evidence and was subject to unidentified undue and prejudicial influence;

- Claim XXV of the amended petition dated 1/4/02 and Claim XXVI of the amended petition dated 1/26/04, wherein Petitioner alleges that evidentiary rulings by the trial court at his original trial effectively prevented Petitioner from presenting a defense, in violation of his constitutional rights, because Petitioner was not permitted to elicit testimony that the Floyd County District Attorney's Office and Floyd County juvenile justice system allegedly knew of Petitioner's alleged mental disorder and alleged high risk for violent behavior but failed to act properly;

- The portion of Claim XXV of the amended petition dated 7/10/06, wherein Petitioner alleges that the proportionality review conducted in Georgia is constitutionally infirm, both in general and as applied;

- Claim XLII of the amended petition dated 1/26/04 and Claim XXVI of the amended petition dated 7/10/06, wherein Petitioner alleges that the lack of a uniform standard for seeking the death penalty across Georgia renders Petitioner's death sentence unconstitutional under *Bush v. Gore*;

- Claim XXVII of the amended petition dated 1/4/02 and Claim XXVIII of the amended petition dated 1/26/04, wherein Petitioner alleges that the trial court's instruction on reasonable doubt at the guilt phase of Petitioner's original trial violated his constitutional rights, specifically that the trial court allegedly equated reasonable doubt and moral certainty;

- Claim XXXIX of the amended petition dated 1/4/02, Claim XL of the amended petition dated

1/26/04 and Claim XXIX of the amended petition dated 7/10/06, wherein Petitioner alleges that his mental retardation remand jury engaged in misconduct and/or considered extrinsic evidence, which included the following:

1) improper consideration of matters extraneous to the trial;

2) improper racial animus which infected the deliberations of the jury;

3) false or misleading responses of jurors on voir dire;

4) improper biases of juror which infected their deliberations;

5) improper exposure to the prejudicial opinions of third parties;

6) improper communications with third parties;

7) improper ex parte communications with the trial judge; and

8) improperly prejudging the guilt/innocence and penalty phases of Petitioner's trial;

- Claim XXXIII of the amended petition dated 1/4/02, Claim XXXIX of the amended petition dated 1/26/04 and Claim XXXI of the amended petition dated 7/10/06, wherein Petitioner alleges that Dr. Laipple was allowed to testify as an expert for the State at the mental retardation remand trial without Petitioner making a knowing and intelligent wavier of the doctor/patient privilege;

- Claim XXXI of the amended petition dated 1/4/02 and Claim XXXII of the amended petition dated 1/26/04, wherein Petitioner alleges that the State presented unidentified testimony it knew or reasonably should have known was perjured at both Petitioner's original trial and his mental retardation remand trial;

- That portion of Claim XXXVII of the amended petition dated 1/4/02, that portion of Claim XXXVIII of the amended petition dated 1/26/04 and that portion of Claim XXXII of the amended petition dated 7/10/06, wherein Petitioner alleges that the trial court's charge on unanimity during the mental retardation remand trial was erroneous and a misstatement of law;

- That portion of Claim XXXIII of the amended petition dated 1/4/02, wherein Petitioner alleges that numerous unspecified portions of the court's instructions at the original trial and at the mental retardation remand trial were confusing, misleading, misstatements of law, burden shifting and otherwise constitutionally defective;

- Claim XXXIII of the amended petition dated 7/10/06, wherein Petitioner alleges that he was denied the ability to be present at all portions of his mental retardation remand trial that were critical to the outcome of the proceedings; and

- Claim XXXIV of the amended petition dated 7/10/06, wherein Petitioner alleges that portions of his original trial and mental retardation remand trial were not recorded in violation of his constitutional rights.

- Claim XXXVI of the amended petition dated 1/4/02 and Claim XXXVII of the amended petition dated 1/26/04, wherein Petitioner alleges that the trial court committed reversible error and allegedly violated Petitioner's constitutional rights when it allegedly violated Georgia statutory law by failing to sequester the jury for Petitioner's mental retardation remand trial; and
- Claim XLI of the amended petition 1/4/02, wherein Petitioner alleges that his sentence of death is being exacted pursuant to a pattern and practice of Georgia prosecuting authorities, courts and juries to discriminate on grounds of race, sex, and poverty in the administration of rights guaranteed by the Eighth and Fourteenth Amendments because, Petitioner alleges, the death penalty has only been imposed against defendants convicted of killing Caucasians.

Procedural Default Standard

To overcome the procedural default of these claims, Petitioner must demonstrate both cause and prejudice or a miscarriage of justice. The "existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable." *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (citations omitted).

As to prejudice that excuses the procedural default, a petitioner must demonstrate "actual prejudice that 'worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Head v. Carr*, 273 Ga. 613, 614 (2001), citing *Turpin v. Todd*, 268 Ga. 820, 828 (1990), quoting *United States v. Frady*, 456 U.S. 152, 170 (1982). This Court finds Petitioner has failed to establish either cause or prejudice or a miscarriage of justice. As a result, these claims remain procedurally defaulted and are dismissed.

The Petitioner's six main claims:

Mr. Foster argued six main issues of alleged error at his habeas hearing and in his post-hearing brief. Specifically, he contended that (1) the State struck all four black prospective jurors at the capital trial on the basis of race; (2) his counsel at the capital trial was ineffective; (3) his counsel at the capital trial had an actual conflict of interest that affected their performance; (4) the State suppressed favorable and material evidence at the capital trial; (5) the jury and the judge at the mental retardation trial engaged in misconduct; and (6) his counsel at the mental retardation trial was ineffective.

On those six issues, the court makes the following findings of fact and conclusions of law:

***Batson* claim**

(1) The Court finds that the prosecution did not violate *Batson v. Kentucky,* 476 U.S. 79, 97 (1986), when it exercised peremptory strikes to remove all four black prospective jurors from the venire at Mr. Foster's capital trial. The Respondent argues that this claim is not reviewable due to the doctrine of res judicata. However, because the Petitioner claims that additional evidence allegedly supporting this ground was discovered subsequent to the Georgia Supreme Court's ruling in *Foster v. State,* 258 Ga. 736 (1988), this court will review the *Batson* claim as to whether Petitioner has shown any change in the facts sufficient to overcome the res judicata bar.

The Petitioner contends that the prosecutor's jury selection notes, which were turned over to the Petitioner subsequent to the 1988 Foster decision via an open records request, specifically identified all potential black jurors by the use of a green highlighter pen. There were four black prospective jurors qualified to serve on the trial jury, and the State exercised peremptory strikes to remove each of them.

Batson requires a three-step analysis: First, the defendant must make a prima facie showing of racial discrimination by presenting evidence of racial bias on the part of the prosecution. Second, the prosecution must offer race-neutral reasons for the peremptory strikes in question. Third, the court must determine whether the prosecution's race-neutral reasons were a pretext for purposeful discrimination in light of "all of

the circumstances that bear upon the issue of racial animosity." *Snyder v. Louisiana,* 552 U.S. 472, 476-478 (2008). At the final stage of a *Batson* inquiry, the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. *Jackson v. State,* 265 Ga. 897 (1995). Mr. Foster's *Batson* claim reached step three in the trial court. Now, reaching step three again on the basis of the new evidence presented in these proceedings, the court finds the following:

There were four copies of the traverse jury list from the Petitioner's trial, and each noted that "[Green Highlighting] Represents Blacks." (Hearing T. 903-26.) The prosecution or its investigators made written notations of the race of each individual prospective juror on its "qualified" juror list. (Hearing T. 949-950, 998-999.)

District Attorney Stephen Lanier and Assistant District Attorney Doug Pullen have both stated that they exercised their peremptory challenges for entirely race-neutral reasons, and that they did not rely upon the highlighted jury lists to make their decision on how to utilize strikes. Furthermore, both the trial court and the Georgia Supreme Court conducted lengthy examinations of the Petitioner's initial *Batson* claims and found no error. This court cannot find that the highlighting of the names of black jurors and the notation of their race can serve to override this previous consideration, especially where the race of each juror was noted. While *Miller-El v. Dretke,* 545 U.S. 231 (2005) and *Adkins v. Warden, Holman CF,*

710 F.3d 1241 (2013) are cited by the Petitioner in support of his claim of purposeful discrimination, as both cases included the fact that prosecutors also marked the race of each prospective juror on their juror cards. This court finds *Miller* and *Adkins* to be distinguishable from the circumstances of this case, as the prosecution here has rebutted the purported evidence of discriminatory intent. The court finds the record evidence shows that every prospective juror, regardless of race, was thoroughly investigated and considered by the prosecution before the exercise of its peremptory challenges. (HT Vol. 2, 218-219, 221.)

At the Petitioner's Motion for New Trial, while under oath as a witness called by Petitioner, District Attorney Stephen Lanier explained that he assisted in jury selection at trial by Assistant District Attorney Doug Pullen and Chief Investigator Clayton Lundy. (MNT. 15-16). Mr. Lanier testified that over the weekend between April 24 and April 27, 1987, he, Mr. Pullen, and Mr. Lundy decided on the ten people they felt would be unfavorable jurors. (MNT. 17). Concurrent with the Petitioner's Motion for New Trial, the State also filed an Affidavit of Mr. Lundy, who testified that "having worked with and knowing Mr. Pullen and Mr. Lanier, each of us knowing the seriousness and penalty of this crime, can honestly state that the strikes used by Mr. Pullen and Mr. Lanier were not racially biased." (1987 R. 557). Mr. Lundy, himself African American, testified that prior to working as chief investigator in the instant case he had served approximately eight years as a police

officer patrolling various neighborhoods in the Rome area. He explained that specifics on African American jurors within the notes and records of the prosecutor were likely information he knew from having lived in Rome all his life, and that he knew many people and could "just come off the top of my head with it." (HT Vol. 2, 175-176, 206-207).

It is further clear that multiple staff members within the office of the district attorney including secretaries, investigators and other assistant district attorneys would take part in adding their personal knowledge to the lists of prospective jurors. (HT Vol. 2, 219.) Mr. Lundy testified that 10 to 12 different individuals would go through the list, make marks and notations and add "little stuff on [prospective jurors] that we know about each." (HT Vol. 2, 220.) The motivation for the passing lists and notes on individual jurors was to help pick a fair jury, especially given that this was a death penalty case. (HT Vol. 2, 221.)

This Court finds that the record is clear that all jurors in this case, regardless of race, were thoroughly investigated and considered before the State exercised its peremptory challenges. The notes and records submitted by Petitioner fail to demonstrate purposeful discrimination on the basis that the race of prospective jurors was either circled, highlighted or otherwise noted on various lists. Furthermore, the State has offered evidence sufficient to rebut such a claim. The court finds that the State put forward multiple race-neutral reasons for striking each juror,

and the Petitioner's claim of inherent discrimination is unfounded by the record. Importantly, this court notes that on direct appeal, trial counsel raised a claim that the trial court erred in finding that the prosecution provided race-neutral reasons for striking the four African American jurors. The Georgia Supreme Court affirmed the trial court's denial of this claim, finding that the prosecutor's explanations were related to the case to be tried, and were clear and reasonably specific. The Georgia Supreme Court held that the trial court did not err by finding these reasons to be sufficiently neutral and legitimate. *Foster v. State*, 258 Ga. at 737-739 (1988).

Accordingly, the court finds the Petitioner's renewed *Batson* claim is without merit.

Ineffective assistance of trial counsel claim

(2) The Court finds that Mr. Foster's trial counsel, Robert Finnell and James Wyatt, were not constitutionally ineffective at the 1987 capital trial under the standard set out by *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To prevail on his ineffectiveness claim, Petitioner must show that (1) trial counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. This requires showing that trial counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence

resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish actual prejudice, a petitioner "must demonstrate that 'there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Head v. Carr*, 273 Ga. 613, 616 (2001). Matters of trial tactics, even if they appear in hindsight to be questionable, are grounds to find counsel ineffective only if the tactical decision is so patently unreasonable that no competent attorney would have chosen it. *McKenzie v. State*, 284 Ga. 342 (2008).

Trial counsel was not deficient for presenting evidence of mental illness to the jury and trial counsel performed a reasonable mental health investigation

The Petitioner specifically contends that trial counsel pursued the defense of "guilty but mentally ill" and sought to prove that the Petitioner suffered from antisocial personality disorder. The Petitioner argues that at the close of the guilt phase, the trial court instructed the jury on Mr. Foster's "guilty but mentally ill" defense, but clarified that "[t]he term 'mentally ill' does not include a mental state manifested only by repeated, unlawful or antisocial conduct." (T. 2431.) The Petitioner contends that the pursuit of this defense was a misunderstanding of the law and evidence of deficient performance of counsel.

At the request of trial counsel, the Petitioner was evaluated by Drs. Samuel Perri and Patrick Brooks at the Floyd County Jail over a four day period. (1987 R. 178-180.) Drs. Perri and Brooks concluded that Petitioner was competent to stand trial and was criminally responsible for his actions. (1987 R. 178-179.) In addition, they found that Petitioner was "moderately depressed," within the borderline range of intelligence and did not suffer from any brain dysfunction or any major mental illness. *Id.* Dr. Douglas Laipple also performed a psychiatric evaluation of Petitioner to determine whether he was "mentally competent to participate in his defense" and to determine whether there were any psychiatric diagnoses that Petitioner had at both the time of the evaluation and at the time of the crime. (HT Vol. 2, 400.) Following his evaluation of Petitioner, Dr. Laipple diagnosed Petitioner with mixed substance abuse and antisocial personality disorder. (HT Vol. 1, 61; Vol. 2, 429.) Dr. Laipple reported that the substance abuse included alcohol, marijuana, cocaine and other substances. (HT Vol. 2, 429.) In his report, Dr. Laipple found the diagnosis of antisocial personality disorder was "manifested by (before the age of fifteen) truancy, suspension from school for misbehavior, delinquency, persistent lying, repeated sexual intercourse in a casual relationship, repeated substance abuse, thefts, poor school performance, and chronic violations of rules at school." *Id.* Regarding Petitioner's ability to distinguish between right and wrong at the time of the crime, Dr. Laipple opined that Petitioner's intoxication at the time of the crime

prevented him from being able to distinguish between right and wrong. (HT Vol. 1, 62; Vol. 2, 429.)

The record evidence shows that trial counsel utilized Dr. Laipple at trial to attempt to prove to the jury that Petitioner suffered from a mental illness and to address the issue of intoxication. (HT Vol. 2, 366.) In presenting the testimony of Dr. Laipple, trial counsel explained that it was a "continuation of the environmental defense. It's another section of it dealing with the impact of drugs and alcohol on human behavior, and Tim's overall capacity with regards to his behavior, his IQ and so forth." (HT Vol. 1, 60.) Trial counsel further stated they used Dr. Laipple's diagnosis to show the jury Petitioner's capacity and "to try and make him a more sympathetic figure to the jury and understanding Tim's overall condition at the time this event occurred." (HT Vol. 1, 60-61.)

The court finds that Petitioner's two trial attorneys were experienced in criminal law. (HT Vol. 1, 80; Vol. 2, 307, 378-379.) Trial counsel conducted an extensive and thorough investigation into Petitioner's background, family history, and mental health prior to trial. This Court finds trial counsel were not deficient in their investigation of Petitioner's background and mental health and Petitioner was not prejudiced by the investigation or its presentation to the jury. As stated by Attorney Finnell: " we were trying to get the jury to understand who Tim was and where he came from and what little resources he had to bring to a situation that he found himself in on that night.

Again, it was all an attempt to get the jury to understand that this was not a life that needed to be taken, in our opinion." The court finds that the presentation of evidence of Petitioner's mental illness was a reasonable trial strategy, and one that was presented in an effort to gain sympathy and avoid a possible death sentence.

Counsel was not ineffective for failing to challenge Petitioner's confession

Mr. Foster made two confessions to the police. The first was unrecorded; the second was recorded on videotape. (T. 1726-27.) At trial, a detective testified about the first confession by reading from his notes. Defense counsel did not object. (T. 1731-35.) The State also played the videotape of Mr. Foster's second confession for the jury. (T. 1744-72.) Defense counsel did object to the admission of the videotape, but the trial court overruled the objection. (T. 1566, 1572.) On appeal, the Georgia Supreme Court held that the trial court erred in admitting the videotaped confession because the interrogators told Mr. Foster that his confession "was not going to hurt 'a thing.'" *Foster v. State*, 258 Ga. 736, 742 (1989) (quoting T. 1749). However, the Court held that the error was harmless because the second confession was "merely cumulative to the first, non-recorded confession." *Foster*, 258 Ga. at 742.

The court finds that the failure to make a meritless objection does not constitute ineffective assistance of counsel. See *Scott v. State*, 298 Ga. App. 376

(2009). The court finds that trial counsel did object to the admission of the second, videotaped confession. The court cannot find, under the circumstances of this case, that any objection made by counsel to testimony about the first confession would have been sustained, especially in light of the Georgia Supreme Court's finding that admission of the videotaped confession was harmless. Accordingly, the court finds no merit to this contention of error.

Trial counsel's guilt phase representation was reasonable

The court finds that trial counsel's guilt phase strategy involved a presentation of mitigation evidence. In keeping with that strategy, trial counsel informed the jury during their guilt phase opening statements that they would present evidence as to why the crime occurred and whether it could have been prevented. (TT. 1599.) Specifically, trial counsel stated to the jury that they would present evidence of Petitioner's life that was "void of parental responsibility, void of the values and value judgments that you and I bring to our family lives, and that we expect from our neighbors." *Id.* In addition, trial counsel noted that Petitioner had prior psychological evaluations performed by the State that "cried out for this boy to get help, to help him." (TT. 1599-1600.) Trial counsel asserted that neither the State nor Petitioner's parents helped him. (TT. 1600.) Trial counsel also stated that there was evidence of "marijuana, of alcohol and of cocaine in a boy that's borderline

mentally retarded, who at the time this occurred was eighteen years old and was living with a twenty-six-year-old woman." *Id.* Trial counsel also asserted that their guilt phase presentation would include evidence that Petitioner lacked the capacity to distinguish between right and wrong at the time of the crime, and that he was mentally ill. *Id.*

During the guilt phase of Petitioner's trial, counsel presented the testimony of twelve witnesses. Three witnesses were employed at the Coosa Valley Mental Health Center in 1984, and they testified as to the various conflicts within Petitioner's family. (TT. 2061-2078.) Part-time juvenile court judge Tim Pape and Deborah McDaniel, a unit director for the Division of Youth Services, testified regarding the Petitioner's juvenile delinquency, his psychological deficiencies, and his troubled home life. (TT. 2082-2111; 2132-2145.) Tim Strickland, who was Petitioner's caseworker at the Community Training Center, testified that he instructed the Petitioner to attend a substance abuse program due to his use of marijuana, but the Petitioner did not attend the program. (TT. 2146-2148.) Don Nix, an administrator with the Division of Youth Services, also testified regarding the Petitioner's juvenile treatment record. (TT. 2153-2161.) Dr. Richard Hark, a clinical psychologist, testified that he interviewed the Petitioner and administered intelligence and personality tests. (TT. 2176.) Marnie Dodd, Petitioner's juvenile court service worker in 1984, testified that she performed the pre-sentence investigation after Petitioner was charged

in juvenile court in November, 1984. (TT. 2196 2197). After completing her report, Ms. Dodd had spoken with Judge Pape regarding her recommendations in Petitioner's delinquency case. (TT. 2198-2199.)

Trial counsel also presented the testimony of Petitioner's parents, Bernice and Ernest Foster. Ms. Foster testified about Petitioner's troubled childhood and drug use. (TT. 2212-2218.) During the questioning by trial counsel, Mr. Foster denied being under the influence of drugs or alcohol, but he was subsequently withdrawn as a witness because he appeared to be "hyped up." (TT. 2221-2225.)

Dr. Laipple was the final witness presented by trial counsel during the guilt phase of Petitioner's trial. Dr. Laipple testified that he conducted an examination of Petitioner. (TT. 2226-2227.) As part of his evaluation, Dr. Laipple interviewed Petitioner on three separate occasions, reviewed reports from other psychiatrists and psychologists, reviewed Petitioner's police statements (both the unrecorded and the videotaped statement), reviewed his juvenile court records, interviewed his parents and interviewed other people who knew or had observed Petitioner's behavior. (TT. 2227-2228.)

In keeping with their guilt phase strategy, trial counsel elicited testimony from Dr. Laipple that Petitioner lacked the ability to distinguish between right and wrong at the time of the crime. (TT. 2229-2232.) Dr. Laipple testified that the opinion was based on the drugs and alcohol that Petitioner had

ingested that night. (TT. 2232.) He explained to the jury that the amount of drugs consumed by Petitioner would have been an "intoxicating amount" that would have resulted in "obscure judgment," and Petitioner would have been unable to function normally and unable "to differentiate between right and wrong." (TT. 2230.) His opinion was also based on findings that Petitioner suffered from substance abuse, antisocial personality disorder, borderline intellectual functioning, and the combination of these three mental disorders "incapacitated" Petitioner "to the point where he was unable to differentiate between right and wrong." (TT. 2232.) Furthermore, Dr. Laipple testified that Petitioner's level of intoxication would have caused the following: a disorder of thought; impaired judgment; an inability to recognize or deal with reality; and an inability to cope with the ordinary demands of life. (TT. 2230.)

Regarding Petitioner's development of a conscience, Dr. Laipple testified that Petitioner's development was "one that would ordinarily develop an antisocial personality disorder." (TT. 2233-2234.) During his childhood, Petitioner's parents failed to spend as much time with him as they did with the other children, and they frequently put the other children in charge of Petitioner and failed to teach him right from wrong. (TT. 2234.) In addition, Dr. Laipple noted that antisocial personality disorder seemed to be "genetic in nature." *Id.* In Petitioner's case, his father possessed several traits of antisocial personality disorder. *Id.* As such, Petitioner had "very

little choice but to develop a lot of those" traits due to genetics and/or the exposures he experienced at a very young age. *Id.* In regards to the diagnosis of borderline intellectual functioning, Dr. Laipple informed the jury that this diagnosis was commonly referred to as borderline mental retardation. (TT. 2236.) As to Petitioner's diagnosis of substance abuse, Dr. Laipple stated that Petitioner suffered from "multiple drug abuse," which included alcohol, marijuana and cocaine. (TT. 2235.)

In closing argument, trial counsel asserted that they had proven beyond a reasonable doubt that Petitioner was mentally ill. (TT. 2346.) Specifically, Petitioner was involuntarily intoxicated and could not differentiate between right and wrong at the time of the crime. *Id.* In addition, trial counsel expressed doubts that Petitioner was at the crime scene alone. (TT. 2348.)

This court finds trial counsel's guilt phase strategy and presentation to the jury was reasonable given that trial counsel possessed evidence that Petitioner was under the considerable influence and control by Lisa Stubbs who provided Petitioner with cocaine and alcohol. During the evidentiary hearing before this court, trial counsel maintained that involuntary intoxication was a possible defense in Petitioner's case. (HT Vol. 1, 101-102.) In support of that theory, trial counsel utilized Dr. Laipple who opined that Petitioner lacked the mental capacity to distinguish between right and wrong and "he did it in the context of involuntary intoxication that he was under the

strong influence of [Lisa Stubbs]." (HT Vol. 1, 102.) In addition, trial counsel testified that they presented Petitioner's parents during the guilt phase as they wanted to "establish that he was living with Lisa Stubbs, that he had left them and gone to live with her and kind of tie that into the involuntary intoxication type thing." (HT Vol. 1, 106.) The court finds that trial counsel used a reasonable trial strategy in presenting evidence of Petitioner's juvenile delinquency, dysfunctional family life, drug use, and mental illness. The court finds trial counsel were not deficient and Petitioner was not prejudiced by trial counsel's guilt phase investigation and representation.

Counsel was not ineffective in failing to investigate and present mitigating evidence

As conceded by the Petitioner, trial counsels' strategy at the penalty phase was to "attempt to get the jury to understand that this was a young man who came from a deprived background genetically, socially, educationally, culturally, in every aspect of life." (H. 355.) Counsel "were hoping that if the jury understood that, that they would find some sympathy for Tim that would dissuade them from imposing the death penalty." (H. 48.) Trial counsel's strategy also involved showing "his condition at the time of the incident being what we thought was intoxicated, under the influence of alcohol and marijuana and so forth." (HT Vol. 2, 355.) In addition, trial

counsel wanted to show the jury that Petitioner was mentally ill at the time of the crime. (HT Vol. 2, 356.)

Both counsel also testified that they met with numerous leading death penalty attorneys, including Millard Farmer, Bobby Lee Cook, and Clive Smith. (HT Vol. 1, 35-36; 86-87.) Trial counsel obtained the services of Investigator George Petusky to help investigate the case. (1987 R. 171-175; HT Vol 40, 12257-12261.) Attorney Finnell stated that it was difficult to obtain information from a community that was guarded with information and existed on the margins of society. (HT Vol. 1, 38-39.) Furthermore, although trial counsel had a good relationship with Petitioner (HT Vol. 1, 37; 85), the Petitioner remained "nonreactive," "unemotional" and "matter of fact." (HT Vol. 2, 297-298.)

Trial counsel found it difficult to receive assistance from Petitioner and his family, specifically his parents, grandmother, and sisters. (HT Vol. 1, 41, 64, 85, 105; HT Vol. 2, 309, 356.) Petitioner's family was reluctant and unhelpful. (HT Vol 1, 37.) During trial counsel's investigation, Mr. Finnell stated that he had a meeting with Petitioner's parents wherein he tried to explain what they were trying to accomplish in regard to Petitioner's defense. (HT Vol. 2, 356-357.) During that meeting, Mr. Finnell attempted to solicit their support "in terms of talking about who they were and what they were and what the environment that Tim grew up in and what were the influences, good or bad, in Tim's life." (HT Vol. 2, 357.) Mr. Finnell explained that they were essentially asking

Petitioner's parents to "fall on their sword for their son by being reflective and self-examining their lives and what types of lives they lived and the impact that would have on a child." Id. Regarding the response of Petitioner's parents during that meeting, Mr. Finnell testified: "They were not cooperative. They did not want to talk about themselves or their lives, they were very defensive about it. At one point, I can remember Mr. Foster telling me that he worked on a garbage truck, that he came home, that he smoked his dope, that he laughed, and that was his life. And he wasn't going to – he was not going to portray that as something that was wrong or would have been a bad influence on Tim." *Id.*

Additionally, Petitioner's parents informed trial counsel during their meeting that they smoked marijuana with Petitioner. (HT Vol. 2, 358-359.) Mr. Finnell explained to his parents that this was "critical information" that needed to be presented to the jury to provide an "understanding as to who Tim was and what were the influences in his life." *Id.* In response to the assertion that Petitioner smoked marijuana with his parents, trial counsel's typed notes show that:

> "Both Bernice and Ernest Foster admitted that they had indeed done so, even on the evening of the White murder, but contended that the use of marijuana only made Tim 'mellow' and really had no bad effects. Bernice and Ernest Foster vehemently declined to offer testimony in court that they had

> used drugs with their son stating that in so doing they would jeopardize Ernest Foster's job with the City of Rome and everything they owned. Bernice and Ernest Foster said they were good parents; that they would not get on the stand and say otherwise; that they had done all they could; and that they would not publicly admit to using drugs regardless of what happened to their son. Bernice Foster said she would trust God to take care of her son. She and Ernest Foster were angry as they walked out of the meeting." *Id.*

Trial counsel presented Petitioner's father as a witness during the trial despite the fact that his father did not want to testify. (FIT Vol. 2, 362.) When Petitioner's father entered the courtroom, he appeared to be in a "catatonic state" and could "barely get to the witness stand." *Id.* The trial court believed that Petitioner's father was under the influence of drugs and/or alcohol. (HT Vol. 2, 362-363.) Petitioner's father was removed from the courthouse and escorted to Floyd Medical Center for a screening. (HT Vol. 2, 363.)

The court finds that trial counsel made extensive efforts to involve Petitioner's family in the discovery and presentation of potential mitigation evidence, but the family was uncooperative. (HT Vol. 1, 37.) Accordingly, due to this lack of cooperation, trial counsel was not ineffective for failing to present more mitigating evidence of the Petitioner's family life and influence.

Additionally, the court finds ample evidence in the record to show that trial counsel conducted a reasonable and competent investigation of Petitioner's case. Trial counsel obtained and fully reviewed previous trial counsel's file. (HT Vol. 1, 33-34, 83; HT Vol. 44, 13339-13390); (HT Vol. 1, 83; HT Vol. 2, 318.) Trial counsel met with Petitioner numerous times. (HT Vol. 1, 37, 85; HT Vol. 2, 382.) Trial counsel also viewed the crime scene. (HT Vol. 2, 372.) The court finds that trial counsel did conduct a reasonable investigation into other people's potential involvement in this case, specifically Lisa Stubbs and Clifford Stocks, but "Tim never pointed the finger at anyone else." (HT Vol. 2, 384.)

Conflict of interest by trial counsel claim

(3) The Court finds that attorney James Wyatt, who represented Mr. Foster and Mr. Foster's uncle, Clifford Stocks, in separate criminal proceedings, did not have an actual conflict of interest which materially or adversely affected the defense's presentation of mitigating evidence at the penalty phase of Mr. Foster's capital trial.

"A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client." *Ga. R. Prof'l Conduct 1.7(a)* Criminal defendants have a right to conflict-free counsel and

prejudice is presumed when counsel is burdened by an actual conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). Prejudice is presumed only where the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." See *Strickland, supra* at 692. An actual conflict is not established by the mere "possibility that a conflict might have developed" and a theoretical or speculative conflict will not impugn a conviction which is supported by competent evidence. *Hudson v. State*, 250 Ga. 479, 482 (1983). To prove that a conflict, in fact, existed, a petitioner "must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remains hypothetical." *Smith v. White*, 815 F.2d 1401, 1404 (11th Cir. 1987).

The record shows that Mr. Wyatt represented Clifford Stocks in a theft-by-taking case and a separate armed robbery and aggravated assault case. (H.T. pg 755-757.) The Georgia Court of Appeals affirmed Mr. Stocks's theft by taking convictions in March of 1987. All charges in the armed robbery and aggravated assault case were resolved either by plea agreement or were withdrawn by the State prior to October 22, 1986, which is the date Mr. Wyatt was appointed to represent the Petitioner. (HT Vol. 48, 14653, 14655.) The Petitioner contends Mr. Wyatt could not maintain his duty of loyalty to Mr. Stocks

while also fulfilling his duty to Mr. Foster to investigate and present mitigating evidence of Mr. Stocks' negative and criminal influence.

This court finds Petitioner has failed to establish that his trial counsel was laboring under any "actual conflict" that "adversely affected" counsel's performance or that Petitioner's case was prejudiced due to the alleged conflict. Mr. Wyatt's involvement was effectively complete in Mr. Stocks' theft by taking case at the time of Petitioner's trial. Mr. Wyatt's representation in Mr. Stocks' armed robbery and aggravated assault case had ended prior to being appointed co-counsel in the Petitioner's case. Thus, this court finds Petitioner's claims of concurrent representation by Mr. Wyatt are not entirely accurate. Furthermore, Petitioner has not shown that Mr. Wyatt made a choice between possible alternative courses of action, and his allegation that an actual conflict existed in this case is hypothetical. The habeas record in this case reflects that Mr. Stocks' relationship was investigated by counsel and that detailed aspects of Petitioner's juvenile criminal activity and early use of alcohol and drugs were thoroughly investigated and presented to the jury. This court finds Petitioner has failed in his burden to demonstrate counsel were deficient in their investigation or that there was a reasonable probability evidence of Mr. Stock's alleged "negative influence" would have changed the outcome during either phase of trial.

Lead trial counsel Robert Finnell testified in the habeas proceedings that the Petitioner's relationship with Mr. Stocks was investigated by counsel, but that it was difficult to elicit information from the Petitioner. (HT Vol. 2, 382-383.) Trial counsel further testified that they investigated Mr. Stocks due to the fact that Petitioner went to live with Mr. Stocks around the age of fifteen or sixteen and because he was a "known criminal in our community." (HT Vol. 1, 39-40; Vol. 2, 361.) Mr. Finnell described Mr. Stocks as a "very shadowy figure" who had a "very poor reputation in the community." (HT Vol. 2, 361.) Both trial counsel and Petitioner's mother felt Mr. Stocks was a negative influence in Petitioner's life. (HT Vol. 1, 40; Vol. 2, 361.)

Trial counsel chose to introduce multiple witnesses regarding Petitioner's delinquent background and early substance abuse. Social worker Linda Lockhart testified regarding Petitioner's visits to the Coosa Valley Mental Health Center when he was 16. Evidence was presented regarding the Petitioner's dropping out of school, his unemployment, and conflicts at home with an older brother. (TT. 2068.) Lois Jean Smith, also employed by Coosa Valley as a social worker, testified that Petitioner's family environment was in a state of crisis at the time, that there was communication problems with Petitioner's parents and older brother, and that Petitioner's own mother's breath smelled of alcohol during the visit to the mental health center. (TT. 2076.) Ms. Smith stated

that Petitioner admitted to using both drugs and alcohol but denied they were a problem. (TT. 2079.)

Tim Pape, a part-time juvenile court judge, testified that Petitioner was brought before his court on a petition for delinquency which was based upon an armed robbery. (TT. 2082-2083.) Judge Pape noted that a psychological report he had ordered at the time showed Petitioner and his parents smoked marijuana, and Youth Services had noted family and situational difficulties for Petitioner partially due to ten people living in the home. (TT. 2110, 2120.) Deborah McDaniel, a unit director with Youth Services, testified that Petitioner had admitted to using marijuana on a daily basis. (TT. 2137.)

The Petitioner's mother, Bernice Foster, testified that the Petitioner was the youngest of her six children. She began to have problems with him at a young age when he was playing Pee Wee league football, and would "get into it" with his coach and did not get along with playmates. (TT. 2212, 2215.) Ms. Foster further testified that when Petitioner entered junior high, he started getting into a lot of fights with others, including teachers and the principal, eventually resulting in him dropping out of school. (TT. 2217). Ms. Foster also testified that Petitioner used marijuana and drank beer. (TT. 2217).

The record in this case shows that Clifford Stocks' relationship to the Petitioner was considered and investigated by counsel. Rather than focus on Mr. Stocks's purported influence on Petitioner, the defense

instead chose, as a trial strategy, to paint a detailed picture of Petitioner's background utilizing those employed in social services and the juvenile court system. As Petitioner has failed to establish deficient performance or a reasonable probability that evidence of Clifford Stocks' "negative influence" would have undermined the verdict in either phase of trial or established the presence of an actual conflict here, he cannot demonstrate ineffectiveness of counsel or resulting prejudice as to this claim. Accordingly, this Court finds no merit to the Petitioner's conflict of interest claim.

Brady violation claim

(4) The Court finds that the prosecution did not violate *Brady v. Maryland*, 373 U.S. 83, 87 (1963), by allegedly suppressing a police report stating that a confidential informant heard that Lisa Stubbs, Mr. Foster's girlfriend, was involved in the crime.

The Petitioner claims that the day after his former girlfriend, Lisa Stubbs, testified at his capital trial, the Floyd County Police took a report from a confidential informant who stated that he or she "heard talk" that Ms. Stubbs was present at the crime scene and assisted Mr. Foster with removal of items from the victim's home. A copy of this report was presented at the evidentiary hearing of this matter, and Mr. Foster's trial counsel testified that the prosecution did not disclose to them the existence of this

police report. H.898; H. 373-74 (Atty. Finnell); H. 298 (Atty. Wyatt). It appears that the purported communication between the confidential information [sic] and the police occurred on the evening on April 30, 1987, which was the day before the jury returned its verdict finding Petitioner guilty on all counts. (1987 R. 370).

The court notes that this issue was not raised at trial or on direct appeal. *Brady* claims can be procedurally defaulted, and in order to overcome the default, the Petitioner must demonstrate both cause and prejudice or miscarriage of justice. As to prejudice to excuse the procedural default of a *Brady* claim, the United States Supreme Court holds that the proper analysis parallels the issue of *Brady* "materiality" such that if information is not material for *Brady* purposes, then no prejudice to excuse the procedural default of the *Brady* claim has been established. *Strickler v. Greene,* 527 U.S. 263, 302-303. To establish a violation of a defendant's due process rights pursuant to *Brady v. Maryland,* the defendant must show: "(1) that the State possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different." *Zant v. Moon,* 264 Ga. 93 (1994).

"Evidence is material only if there is a 'reasonable probability' that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *U.S. v. Bagley,* 473 U.S. 667, 682 (1985). The mere fact that some undisclosed information might have helped the defense does not establish its materiality in a constitutional sense. *Castell v. State,* 250 Ga. 776 (1983). "[S]howing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more." *Kyles v. Whitley,* 514 U.S. 419, 421 (1995), 514 U.S. at 437. Instead, a Brady violation is established only "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles,* 514 U.S. at 435; see also *Strickler,* 527 U.S. at 290.

In determining whether evidence is "material" in a constitutional sense, so as to establish a "Brady" violation, the United States Supreme Court explained that "[t]he judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless-error standard. [T]he constitutional standard of materiality must impose a higher burden on the defendant. [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must

be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *U.S. v. Agurs,* 427 U.S. 97, 111-113 (1976) (footnotes omitted).

This court finds that the Petitioner has failed to establish either cause or prejudice, and the alleged *Brady* violation claim therefore remains procedurally defaulted. This court cannot find that the police report was in the possession of the State at the time of trial, that it was favorable, exculpatory or material to the Petitioner's defense, or that the State's alleged failure to disclose the report has resulted in a miscarriage of justice. Accordingly, as Petitioner did not raise these issues at trial and/or appeal and did not make a showing of cause and actual prejudice or of a miscarriage of justice which would be sufficient to excuse his procedural default of these claims, the claims are procedurally defaulted and not properly before this Court.

Juror misconduct, improper ex parte communications, and improper juror consideration claim

(5) In 1999, Judge Walter J. Matthews presided over the Petitioner's mental retardation trial, which was held pursuant to *Fleming v. Zant,* 259 Ga. 687 (1989). The trial was held in Floyd County, and the jury found that Mr. Foster was not mentally retarded. M.R.R. 394. The Petitioner now claims that: a) juror

William Harrison failed to disclose knowledge of Petitioner's conviction and death sentence during voir dire; b) the judge engaged in improper *ex parte* communications with a juror during the mental retardation trial; and c) several jurors considered prejudicial extraneous evidence surrounding Petitioner's convictions and sentences in deciding the issue of mental retardation.

This Court finds Petitioner's claims of juror and judicial misconduct in his mental retardation trial are procedurally defaulted pursuant to *Black v. Hardin*, 255 Ga. 239 (1985). The Court notes that following his mental retardation trial, Petitioner failed to raise any of the claims in his direct appeal. *Foster v. State*, 272 Ga. 69 (2000).

Juror Harrison

The general rule in Georgia is that jurors may not impeach their own verdict. There are exceptions when "extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interfered with the jury's deliberations." *Glover v. State*, 274 Ga. 213 (2001) (citations omitted). To be entitled to a new trial based on a voir dire examination, a defendant must show that: (1) the juror failed to answer honestly a material question on voir dire and (2) a correct response would have provided a valid basis for a challenge for cause. *Glover* at 214.

This court finds that Juror Harrison's affidavit does not show that he failed to honestly answer the material question of whether he had prior knowledge of the Petitioner's case at the time of voir dire. Rather, Mr. Harrison's affidavit states that he was aware the Petitioner was on death row prior to the first witness's testimony. Furthermore, Juror Harrison stated that based upon the evidence presented, he believed that the Petitioner was not mentally retarded. (Hearing T. 702-703.) Juror Harrison did not state that his verdict was based upon any prior knowledge of the Petitioner's conviction and sentence. Accordingly, this court finds that the Petitioner has failed to establish prejudice as to the claim regarding Juror Harrison.

Improper ex parte communication between trial judge and juror

Juror Helen Lane offered affidavit and in-person testimony at the evidentiary hearing. Juror Lane's affidavit states that she passed a note to Judge Matthews through the bailiff, and that she and Judge Matthews then had a conversation alone in his office. (Hearing T. Vol. 3, 733.) In her direct testimony, Juror Lane stated that she did not recall whether anyone else was present during the alleged meeting. (Hearing T. Vol 1, 124.) Juror Lane's affidavit and testimony also differ as to when the alleged ex parte contact occurred. (Hearing T. Vol. 3,735; 124, 130). Contrary to the allegations in her affidavit, Juror Lane testified that she did not believe she told Judge Matthews that "Timothy Foster was trying to escape the death

penalty." Juror Lane also testified that no part of the alleged exchange affected her decision as to whether the Petitioner was mentally retarded. (Hearing T. Vol. 3, 125, 130).

Judge Matthews' testimony disputed Juror Lane's affidavit and testimony in their entirety. Judge Matthews testified that he had never received a note from a juror who wanted to speak with him toward the end of this trial. He further testified that no juror had ever told him the mental retardation remand trial had something to do with the death of Queen Madge White, and that no juror told him that they realized Petitioner was trying to escape the death penalty. (HT Vol. 1, 143-144). Judge Matthews testified that when a different juror in this case passed a note to him wanting to discuss a media story which had upset her, the judge immediately brought in counsel for the State and the Petitioner before discussing the matter with the juror. (HT Vol. 1, 143). Judge Matthews testified that whenever he has received a juror note, it had always been his practice to notify counsel, and then meet with counsel and the juror to address any issues. (Hearing T. Vol 3, 143-144, 152-153.)

After reviewing Juror Lane's affidavit, her testimony, and Judge Matthews' testimony, this court finds that Judge Matthews' testimony and credibility greatly outweigh the inconsistencies of Juror Lane. Accordingly, this court finds that no improper ex parte communications occurred between Judge Matthews and Juror Lane during the mental retardation trial.

Improper juror consideration of extraneous and prejudicial evidence

To the extent that Petitioner seeks to utilize the affidavit testimony of Mr. Harrison to undermine the verdicts of other jurors' finding that Petitioner is not mentally retarded, this court finds the testimony to be inadmissible. *Bowden v. State*, 126 Ga. 578 (1906) (holding "[a]s a matter of public policy, a juror cannot be heard to impeach his verdict, either by way of disclosing the incompetency or misconduct of his fellow juror, or by showing his own misconduct or disqualification, from any cause").

To the extent that Petitioner seeks to show misconduct by fellow jurors or that other jurors did not base their verdicts upon the evidence, this court finds the affidavit testimony cited is inadmissible as impermissible impeachment evidence, hearsay and speculation. The court further finds Petitioner has presented no admissible evidence that jurors based their verdicts upon extraneous evidence. Accordingly, the court finds no merit to the Petitioner's contention that he was denied his right to a fair trial by improper juror consideration of extraneous and prejudicial evidence.

Alleged ineffective assistance of counsel by Petitioner's remand counsel at his mental retardation trial

(6) The Court finds that Mr. Foster did not receive ineffective assistance of counsel at his 1999 mental

retardation trial under the standard of *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

Petitioner was represented at his mental retardation remand trial by Attorneys Jon Douglas Stewart and Michael Mears. Mr. Stewart became a member of the State Bar of Georgia in 1962. (HT Vol. 4, 1006). Following the completion of law school, Mr. Stewart worked for a firm for about six years wherein he performed insurance defense work. (HT Vol. 4, 1010). He subsequently joined a firm in Gainesville, Georgia, and he was placed on the appointed list in Hall County. (HT Vol. 4, 1010, 1012).

During his career, Mr. Stewart has tried through verdict over two hundred civil cases. (HT Vol. 4, 1054). Regarding his criminal experience, Mr. Stewart testified that he tried two or three jury trials. (HT Vol. 4, 1012). Prior to Petitioner's case, Mr. Stewart had not been involved in any death penalty cases. (HT Vol. 4, 1013). Although Mr. Stewart's criminal practice was geared towards the defense side, he testified that he specially prosecuted a murder case and obtained a conviction. (HT Vol. 4, 1013-1014). Mr. Stewart had also handled several closed head injury cases. (HT Vol. 4, 1055). In addition, he had attended numerous seminars that dealt with closed head injuries. Id. As such, Mr. Stewart knew that "trauma can drastically reduce the intelligence quotient of a fully active, healthy grown man who would otherwise have an average IQ." Id. Mr. Stewart further stated that he "knew something about the brain" and

how the brain "responds to various different things." Id.

Mr. Mears had extensive experience in the representation of capital defendants. Since the mid 1980's, Mr. Mears's practice had primarily been in criminal defense with a "strong emphasis on death penalty defense work." (HT Vol. 5, 1175). During his career, Mr. Mears attended death penalty seminars. Id. In addition, he has "presented at a number of seminars involving criminal procedure and the defense of death penalty case procedures." (HT Vol. 5, 1175-1176). Prior to Petitioner's case, Mr. Mears had tried about ten or twelve murder cases, and he had tried about seven or eight death penalty cases. (HT Vol. 5, 1176).

At the time of his representation of Petitioner, Mr. Mears had experience in cases involving mental health and mental retardation. (HT Vol. 5, 1177-1178). Mr. Mears described his experience with mental health and mental retardation issues as coming from "on-the-job training," and that his "training was by exposure to mental health issues in the trial of cases." Id. Prior to Petitioner's case, Mr. Mears had tried at least two cases that involved incompetency to stand trial. (HT Vol. 5, 1177). He had also attended seminars wherein mental retardation and other mental illnesses were discussed. Id. In addition to their own experience, remand counsel also had the assistance and resources of other attorneys, investigators and a mitigation specialist from the Multi-County

Public Defender's Office and the Georgia Resource Center. (HT Vol. 4, 1017; Vol. 5, 1194).

As Petitioner's case was remanded to the trial court on the issue of mental retardation pursuant to *Fleming v. Zant, supra,* it was Petitioner's burden to establish by a preponderance of the evidence that he is mentally retarded. *Zant v. Foster,* 261 Ga. 450, 452 (1991). After the presentation of extensive evidence from both sides, Petitioner was found not mentally retarded by a jury. In the instant habeas corpus case, this court finds Petitioner failed to establish that trial counsel was deficient in investigating and presenting his claim of mental retardation and that this alleged deficiency prejudiced Petitioner.

The court finds the record establishes that remand counsel conducted extensive research on the issue of mental retardation. (HT Vol. 24, 7078-7326; Vol. 25, 7327-7626; Vol. 26, 7627-7842; Vol. 27, 7980-7999; Vol. 29, 8752-8839; Vol. 30, 8864-8913, 9009-9033; Vol. 31, 9152-9172, 9184-9205, 9247-9252, 9382-9438; Vol. 32, 9439-9461, 9472-9635; Vol. 33, 9786-9834, 9890-9914, 9918-9933; Vol. 39, 11767-11984; Vol. 40, 11985-12040). As part of his preparation for the remand trial, Mr. Stewart testified that he "studied the medical," read numerous articles on mental retardation, obtained the manual entitled, "Manual for Attorneys Representing Death Sentenced Prisoners in Postconviction Proceedings," and talked with a psychiatrist to get himself "up to speed on the issue of mental retardation." (HT Vol. 4, 1025, 1044, 1056, 1128; Vol. 28, 8268-8416). In addition, Mr. Stewart

purchased the Diagnostic and Statistical Manual of Mental Disorders (hereinafter "DSM") that was current at that time, and he then "memorized" it. (HT Vol. 4, 1024). Mr. Stewart also attended the entire trial of Earnest Morrison, a mental retardation remand trial of a capital defendant that was being tried by District Attorney Danny Craig in Augusta, Georgia, and he obtained documents from other cases that involved a mental retardation remand trial. (HT Vol. 4, 1024; Vol. 13, 3734-3989). Regarding his knowledge of mental retardation, Mr. Stewart stated, "I think I had a pretty good handle on mental retardation." (HT Vol. 4, 1025).

The record also shows that Mr. Mears was knowledgeable about mental retardation. During his deposition, Mr. Mears testified that "proving or disproving mental retardation is not just an IQ score. There has to be a lack of adaptive skills and there has to be a pattern of mental retardation or inability to adapt to ordinary day-to-day skills." (HT Vol. 5, 1207). As such, Mr. Mears stated that a psychosocial history was "extremely important when you're trying to prove all of the prongs of mental retardation." Id.

As part of their investigation, remand counsel and members of the remand team spoke with Petitioner's original trial attorneys, Robert Finnell and James Wyatt. (HT Vol. 4, 1021; Vol. 5, 1206; Vol. 36, 10935, 10954; Vol. 43, 13109-13110). Remand counsel read the transcript of the proceedings from the original trial. (HT Vol. 4, 1037; Vol. 5, 1206). Remand counsel also received the files from Petitioner's

original trial attorneys. (HT Vol. 4, 1042; Vol. 36, 10959, 10966). Remand counsel and their team reviewed the State's file during their investigation. (HT Vol. 34, 10243; HT Vol. 4, 1049-1050).

During the investigation, remand counsel obtained extensive records regarding Petitioner and his family. Mr. Stewart testified that he obtained the records on Petitioner as he knew the "developmental history" was "very important in mental retardation." (HT Vol. 4, 1041). As evidenced by the record, remand counsel requested Petitioner's birth records and birth certificate, medical records, school records, juvenile records, DFACS records, psychological and psychiatric records, jail and prison records, criminal history and credit reports. (HT Vol. 23, 6753-6774, 6782-6796, 6800-6856, 6865-6866). In response to those requests, remand counsel received the following records on Petitioner: birth certificate; birth records; medical records; school records which included psychological testing; juvenile records; credit report; jail records which included escape records; prison records; GCIC and Central State Hospital records. (HT Vol. 4, 1040-1041; Vol. 5, 1320-1450; Vol. 6, 1451-1585; Vol. 12, 3636-3673; Vol. 20, 5818-6049; Vol. 21, 6050-6348; Vol. 22, 6349-6720; Vol. 23, 6882-6911, 6918-7025; Vol. 24, 7026-7079; Vol. 36, 10967; Vol. 40, 12373-12417). Remand counsel also had the raw data of Dr. Howard Albrecht. (HT Vol. 6, 1485-1520; Vol. 41, 12328-12372). In addition to the records, remand counsel obtained childhood photographs of Petitioner. (HT Vol. 23, 6744-6750).

Remand counsel obtained numerous records on various members of Petitioner's family as they wanted to determine if there was a "genetic component" to Petitioner's mental health problems. (HT Vol. 5, 1210-1211). Specifically, counsel obtained the following records: Petitioner's mother's school records, credit reports and marriage records, (HT Vol. 14, 4005-4022, 4026-4045); Petitioner's father's birth certificate, medical records, school records, employment records, credit reports, criminal history and criminal records, (HT Vol. 14, 4081-4226, 4230-4254); Petitioner's sister's (Linda King) birth certificate, medical records, criminal records, marriage records, credit records, employment records, school records, (HT Vol. 15, 4266, 4302-4306, 4310-4547; Vol. 16, 4553-4565); Petitioner's sister's (Teresa Foster) birth certificate, birth records, medical records, school records, employment records, credit reports, criminal history, psychological testing records, civil court records, (HT Vol. 16, 4644-4852; Vol. 17, 4853-5012); Petitioner's sister's (Ernestine Cunningham) birth certificate, birth records, medical records, school records, employment records, credit report, civil court records, (HT Vol. 17, 5046-5155; Vol. 18, 5156-5429); Petitioner's sister's (Dana Foster) criminal history and criminal records, (HT Vol. 16, 4587-4608); Petitioner's brother's (Ernest Lamar McConnell, Jr.) school records, medical records, employment records, credit reports, criminal history, criminal records, jail records, (HT Vol. 19, 5486-5499, 5503-5535, 5590-5659); The death certificate of Petitioner's relative Willie Mae Clemmons Foster (HT Vol. 20, 5759), and; The criminal records of Petitioner's relatives

(James McConnell, Waschunn Foster, Lillie Heath, Thurman Cunningham, Jr., Morris King, Jr., Javan Staples, Claude Foster, Barbara Poole, Rosa Mae Finch, and Terry Foster) (HT Vol. 19, 5539-5587, 5661-5746; HT Vol. 20, 5782-5784, 5787-5791, 5795-5817).

Remand counsel testified that they met with Petitioner but he was not helpful in the preparation of the case. (HT Vol. 4, 1026; Vol. 5, 1201). Mr. Stewart tried to get Petitioner to talk about his childhood. (HT Vol. 4, 1027). Mr. Stewart testified that he never talked to Petitioner about the crime. (HT Vol. 4, 1026).

In an effort to obtain information about Petitioner's background, remand counsel and members of the remand team spoke with his parents and siblings and prepared memoranda detailing the information provided during the interviews. (HT Vol. 4, 1037; Vol. 36, 10856-10857; Vol. 41, 12420-12427). Regarding Petitioner's family, Mr. Stewart testified that they were "cooperative up until the time of trial." (HT Vol. 4, 1038). Mr. Stewart testified that Petitioner's mother was very involved in the case, and that Petitioner's other family members were not as involved in the case. (HT Vol. 4, 1039).

In describing Petitioner's family, Mr. Stewart stated that they were "very childlike," and that Petitioner's mother was "probably the smartest one of all and it was hard to tell her what we were doing and why we were doing it." (HT Vol. 4, 1038). Mr.

Stewart described Petitioner's father as "nice," but he was mentally retarded "according to the physician that we had test him." (HT Vol. 4, 1039). Regarding Petitioner's sisters, Mr. Stewart stated that they were involved in "what was happening in their own lives." Id. Mr. Stewart made a strategical decision not to call the Petitioner's family as witnesses in the mental retardation trial because he feared they would have been unpredictable and unclear as to their purpose. (HT Vol. 4, 1045-1046). Mr. Mears testified that he also had concerns about the Petitioner's mother's potential behavior on the witness stand. (HT Vol. 5, 1208-1209).

Remand counsel spoke with some of Petitioner's teachers who were "very reluctant to talk" as the victim was "one of their own, and they knew, all of them, the story." (HT Vol. 4, 1037). Despite their reluctance, the record clearly shows that the remand team interviewed Petitioner's teachers and obtained relevant information. In addition, there is a chart from remand counsel's files that contains contact information for Petitioner's teachers, notes regarding the statements made by the teachers and information about scheduled meetings with several of Petitioner's teachers. (HT Vol. 5, 1362-1364). However, one teacher, Ms. Umberhandt, was not "as strong a witness in support of mental retardation as. first thought." (HT Vol. 43, 13115).

Remand counsel did not call any of Petitioner's teachers during the mental retardation remand trial as he did not believe that they would be helpful to the

case. (HT Vol. 4, 1038). Mr. Stewart testified that "[t]here was no reason to call someone who was reluctant to testify and would not give you any information that would be helpful to you." (HT Vol. 4, 1037-1038).

The record also shows that remand counsel spoke with one of Petitioner's neighbors. According to a memo dated December 21, 1998, the remand team met with Katie Marcus. (HT Vol. 43, 13150). Ms. Marcus, who was a neighbor of Petitioner's family, stated that Petitioner used to cut her grass. Id. She opined that Petitioner had "mental disturbances" as he was unresponsive at times when she asked him general questions. Id. Ms. Marcus also stated that Petitioner was a "good kid" who lacked a stable family environment. Id. Regarding Petitioner's family, Ms. Marcus stated that they smoked marijuana and were "strange." Id.

Another witness that was interviewed by remand counsel, Ms. McDaniel, noted that Petitioner was behind in reading and writing; however, there was no doubt that Petitioner knew the difference between right and wrong. (HT Vol. 43, 13153). In addition, she was "certain that Tim was not mentally retarded because children were typically seen by a psychologist before being admitted into the [Community Training Center] program" as they did not want children with low IQ's in the program. Id. Ms. McDaniel further stated that her belief [sic] that Petitioner could pass the GED if he tried. Id.

In addition, remand counsel met with Lillie Mae Heath. (HT Vol. 20, 5786). Ms. Heath, who was Petitioner's aunt, informed remand counsel that Petitioner always had a temper and could "snap in an instant." Id. Regarding her opinion as to whether Petitioner was mentally retarded, Ms. Heath stated that Petitioner was not slow and did not develop at a slower rate than his siblings or other children his age. Id. She further stated that Petitioner "had lots of friends, helped around the house, kept himself neat and clean, and did well in school." Id.

Presentation of Petitioner's Mental Retardation Claim Was Reasonable

During their opening statements to the jury, remand counsel informed the jury that they were to decide whether Petitioner was mentally retarded as defined by Georgia law. (M.R. Trial, pp. 297-298). According to Georgia law, mental retardation was defined as "significantly sub-average general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested itself during the developmental period. (M.R. Trial, p. 301). Remand counsel explained to the jury that "significantly sub-average intellectual function" was an IQ of approximately seventy or below, and that there was a measurement of error of five points in assessing IQ. (M.R. Trial, pp. 301-303). As such, it was possible to diagnose a person with mental retardation if their IQ was between seventy and seventy-five. (M.R. Trial, p. 303). Regarding deficits in adaptive

functioning, remand counsel stated that a mentally retarded person must have impairments in at least two of the following areas: skills; work; leisure; health; safety; home living; social and personal skills; communication; and self-care. (M.R. Trial, pp. 300-302). Remand counsel further stated to the jury that the onset of mental retardation must be before the age of eighteen. (M.R. Trial, p. 302).

During the mental retardation remand trial, counsel presented the testimony of two expert witnesses. The first witness presented by remand counsel was Dr. Anthony Stringer. Dr. Stringer, a neuro-psychologist, testified that the definition of mental retardation in the Georgia Code was "essentially the same definition" that was contained in the DSM-IV. (M.R. Trial, pp. 337-338). Regarding sub-average intellectual functioning, Dr. Stringer explained to the jury that this meant that a person's IQ score on a standardized intelligence test placed them "roughly two standard deviations below average" and "in a range which is below that of approximately 90 to 95 percent of people their age." (M.R. Trial, p. 338). In defining adaptive functioning to the jury, Dr. Stringer explained that it referred to the everyday activities that a person has to do "in order to be a successful member of society." (M.R. Trial, p. 341). Dr. Stringer then provided a brief explanation regarding the skill areas contained in the DSM-IV that relate to adaptive functioning. (M.R. Trial, pp. 341-343). Regarding the third criteria for a diagnosis of mental retardation, Dr. Stringer stated

that the onset must occur prior to the age of eighteen. (M.R. Trial, pp. 343-344).

Dr. Stringer testified that he had examined Petitioner's father, Ernest Foster, on February 27, 1999. (M.R. Trial, p. 346). During the examination, Dr. Stringer performed a clinical interview of Mr. Foster and his wife. (M.R. Trial, p. 348). Dr. Stringer concluded that Petitioner's father met all the criteria for mental retardation. (M.R. Trial, p. 371). Regarding Petitioner's father's adaptive functioning, Dr. Stringer testified that he exhibited "impairments in his ability to manage money, his ability to manage home and transportation, his ability to take care of health concerns, to keep himself safe." (M.R. Trial, p. 365). Further, the historical record provided by Ernest Foster and his wife and a review of school and employment records proved that the onset of his mental retardation was prior to the age of eighteen. (M.R. Trial, p. 366). In addition to eliciting testimony from Dr. Stringer regarding Petitioner's father's mental retardation, remand counsel also presented evidence regarding the correlation between heredity and the development of mental retardation. (M.R. Trial, pp. 335-336).

Remand counsel also presented the testimony of a psychologist, Dr. Robert Shaffer. Similar to Dr. Stringer, remand counsel elicited testimony from Dr. Shaffer regarding the definition of mental retardation and the three prongs that must be proven to warrant a diagnosis of mental retardation. (M.R. Trial, pp. 432, 444-447). Dr. Shaffer provided the jury with

information as to the various levels of mental retardation. (M.R. Trial, pp. 429-430). According to the established guidelines, a person with an IQ score between fifty or fifty-five up through seventy are considered to be mildly mentally retarded. (M.R. Trial, p. 429). Dr. Shaffer noted that some guidelines considered an IQ score of seventy to seventy-five to be in the upper range of mild mental retardation. (M.R. Trial, pp. 429, 431).

Pursuant to the request of remand counsel, Dr. Shaffer performed an evaluation of Petitioner. (M.R. Trial, p. 447). As part of his evaluation, Dr. Shaffer administered standard IQ tests and neuropsychological tests. *Id.* Specifically, Dr. Shaffer administered the Halstead-Reitan Neuropsychological Test Battery, the Stanford-Binet Intelligence Scale, Fourth Edition, the WAIS-III and the Vineland Adaptive Behavior Scales (hereinafter "Vineland"). (M.R. Trial, pp. 449-450). Dr. Shaffer stated that Petitioner obtained a composite score of 65 on the Standford-Binet [sic] and a full scale IQ of 58 on the WAIS-III. (M.R. Trial, p. 451). The results of the Vineland revealed that Petitioner performed at a "national percentile rank of less than one-tenth of one percent" in communication, daily living and socialization skills. (M.R. Trial, p. 453). The age-equivalent scores for Petitioner were as follows: eight years, eight months in the communication domain; five years, nine months in the daily living skills domain; and five years, eight months in the socialization skills domain. (M.R. Trial, pp. 453-454).

Regarding the neurological testing, Dr. Shaffer testified that Petitioner scored in the impaired range on five out of the six measures used to assess neurological functions. (M.R. Trial, p. 455). Specifically, Petitioner scored in the moderate level of impairment on the Tactual Performance Test. (M.R. Trial, pp. 456-457). On the Category Test, Petitioner "exhibited classical signs of neurological impairment such as perseveration." (M.R. Trial, p. 457). Dr. Shaffer testified that the Category Test revealed that Petitioner's "thinking was extremely concrete and quite narrow." (M.R. Trial, p. 458). Regarding the Finger Oscillation and Trailmaking tests, Dr. Shaffer stated that the scores revealed "mild to moderate lack of brain development or brain compromise." (M.R. Trial, p. 459).

In addition to the neurological testing, Dr. Shaffer testified that there was evidence from Petitioner's history that supported his conclusion that Petitioner suffered from a compromised brain and central nervous system. (M.R. Trial, p. 460). Specifically, Dr. Shaffer testified that Petitioner was born six weeks premature with a "dangerously low" birth weight and was placed in an incubator for about two and a half weeks. (M.R. Trial, pp. 460-461). Dr. Shaffer explained to the jury that a low birth weight was "statistically related to deficits in intellectual functioning in later life." (M.R. Trial, p. 461). In addition, Dr. Shaffer testified that Petitioner fell and hit his head on a rock at the age or four or five, hit his head on a car dashboard during an automobile accident at the

age of six or seven, and was struck by a car while riding a bicycle at the age of ten. (M.R. Trial, pp. 461-462). As part of his evaluation, Dr. Shaffer reviewed Petitioner's prior test scores relating to intellectual functioning. (M.R. Trial, p. 467). In reviewing all of Petitioner's test scores, Dr. Shaffer noted that the test scores revealed a "gradual decline over the course of several years in the intellectual functioning of Mr. Foster." Id. The decline in Petitioner's test scores was indicative of a "progressive deterioration or some kind of progressive compromise in his intellectual skills." (M.R. Trial, p. 468). Dr. Shaffer informed the jury that there were six IQ scores obtained on Petitioner starting at age ten and then again at ages sixteen, nineteen, twenty-two, twenty-five and thirty. Id. These IQ scores started at eighty and then declined to seventy-nine, seventy-one, sixty-eight, sixty-seven and fifty-eight. Id. Dr. Shaffer stated that these scores demonstrated a "gradual decline in the intellectual skills that did originate in the developmental period." (M.R. Trial, pp. 468-469). In support of his opinion, Dr. Shaffer stated that Petitioner's score of seventy-nine that was obtained when he was sixteen years old could be lowered three to five points due to the fact that the test was ten years old at the time it was administered. (M.R. Trial, p. 471).

Dr. Shaffer concluded that Petitioner met all three prongs for mental retardation as defined by Georgia law. (M.R. Trial, pp. 462, 465-467). Specifically, Dr. Shaffer found that Petitioner's IQ test scores fell in the range of significantly sub-average

intellectual skills, that Petitioner had significantly sub-average adaptive behavior and that these impairments originated during the developmental period. Id.

During their closing arguments, remand counsel reminded the jury that they were responsible for making the determination as to whether or not Petitioner was mildly mentally retarded. (M.R. Trial, p. 752). Remand counsel stated that a mildly mentally retarded person usually functioned at a sixth or seventh grade level. (M.R. Trial, p. 753). Remand counsel asserted that they had presented psychologists with "excellent credentials" who opined that Petitioner was mentally retarded. (M.R. Trial, p. 757). Regarding Petitioner's mental retardation, remand counsel stated that the school records showed that he repeated the first grade, and that he struggled in the fifth grade with reading and spelling. (M.R. Trial, pp. 755-756). Specifically, Petitioner had difficulty retaining information and had minimal self-confidence. (M.R. Trial, pp. 756-757). As such, the school recommended that Petitioner be tested for a learning disability. (M.R. Trial, p. 757). The test results showed that Petitioner's reading was at a 4.4 grade level, spelling was at a 3.9 grade level and arithmetic was at a 3.2 grade level. Id.

According to Dr. Shaffer, Petitioner's scores on IQ tests steadily dropped. (M.R. Trial, p. 759). This gradual decrease in Petitioner's test scores could be attributed to his premature birth, low birth weight and several childhood head injuries. (M.R. Trial, pp.

759-760). In addition, remand counsel reminded the jury that Petitioner's father was mentally retarded. (M.R. Trial, p. 760). As such, Petitioner was predisposed to be mentally retarded due to heredity. Id.

Regarding the allegations made by the State that Petitioner was malingering, remand counsel asserted that Petitioner's test scores would be "scattered" if he were malingering. (M.R. Trial, p. 763). Dr. Shaffer testified that all of Petitioner's test scores were consistent, which ruled out the possibility that Petitioner was malingering. (M.R. Trial, pp. 762-763). In addition, Dr. Shaffer administered several tests to Petitioner, and the test scores were all consistent. (M.R. Trial, p. 763). During his deposition, Mr. Stewart testified as to his difficulty in proving to the jury that Petitioner was mentally retarded. Specifically, Mr. Stewart stated: " it was a hard burden to over – to carry, to show that because he was still mentally retarded even though the test grades prior to age 16 showed that he was above the score for mental retardation, and to try to explain that." (HT Vol. 4, 1066-1067).

Further, remand counsel's presentation at trial was reasonable as adaptive behavior deficits were properly introduced through an expert witness rather than lay witnesses. The court finds no deficient performance in remand counsel's failure to call lay witnesses who the Petitioner contends could have testified regarding deficits in adaptive behavior. Dr. Shaffer testified that: "In looking at the Vineland Adaptive Behavior Scales we provide what is called

a structured interview to the people in this patient's life who have the best information about what he actually did during the developmental period just hundreds of questions that the individual person responds to based on their personal observations of Mr. Foster." (M.R. Trial, p. 452). Thus, lay witness testimony was incorporated through Dr. Shaffer's use of a standardized measure. Dr. Shaffer further testified that based upon his results, the Petitioner had significantly sub-average general intellectual functioning. (M.R. Trial, p. 454). Therefore, this court finds that adaptive behavior deficits were reasonably presented at trial.

Remand counsel reasonably relied upon the presentation of Petitioner's IQ scores, as those scores were directly obtained through contemporaneous intelligence testing conducted by Petitioner's own experts. (M.R. Trial, pp. 356-357, p. 451). Drs. Stringer and Shaffer testified directly as to their findings, and submitted to cross examination by the State. Neither IQ test introduced by the State was done so through the testing agent for verification and explanation of their findings. (Pet. PHB 88). Thus, this Court finds remand counsel's choice to directly present and explain his own IQ findings through the experts who obtained those scores rather than directly challenge those introduced by the State was reasonable.

Remand counsel were not deficient in failing to object to letters attributed to Petitioner from his prison file

Petitioner alleges that remand counsel were ineffective in failing to object to the introduction of the letters that the State attributed to Petitioner from his prison file and were rendered ineffective by withdrawing their objection to the admissibility of those letters. During the mental retardation remand trial, the State introduced three handwritten letters that were identified by employees of the Georgia Diagnostic and Classification Prison as being written by Petitioner. (M.R. Trial, pp. 607-618). Mr. Stewart testified during his deposition that he believed that the letters were not written by the same person. (HT Vol. 4, 1046). He acknowledged that one of the letters might have been written by Petitioner; however, Mr. Stewart stated that Petitioner did not write all three letters as the "three handwritings were so different from each other that practically a blind man could tell that." (HT Vol. 4, 1048).

During a discussion with the remand court as to the admissibility of the three letters, remand counsel stated that it would be "unfair and prejudicial" if one of the letters was admitted into the evidence and the other two letters were not admitted. (M.R. Trial, p. 651). Remand counsel explained that one of the State's witnesses had stated on cross-examination that all three letters were written by the same person. (M.R. Trial, p. 652). As such, remand counsel argued that the jury had the "right to consider that." *Id.* Remand counsel subsequently withdrew its objection to the

letters and requested that portions of the letters be redacted. (M.R. Trial, p. 654). Remand counsel and the State were then afforded an opportunity to review the letters to see if they could agree upon the redactions. (M.R. Trial, pp. 654-655). As evidenced by the exhibits, there were some portions of the letters that were redacted. (State Exhibits 3-5).

This court finds Petitioner has failed to show any deficiency or prejudice as remand counsel was able to first persuade the court that allowance of just one of the three letters would be prejudicial, and second that portions of the letters should be redacted. Having all three letters introduced allowed remand counsel to distinguish the handwriting styles of each letter, casting doubt upon the State's assertion that all three were written by Petitioner. Given this strategic decision of remand counsel, this court finds Petitioner cannot show deficiency or prejudice as to this claim.

This court finds Petitioner has failed to demonstrate any deficiency or prejudice arising from remand counsel's reasonable presentation during Petitioner's mental retardation trial. Accordingly, this claim is denied, and the Petitioner is not entitled to a new mental retardation trial on the basis of ineffective assistance of counsel.

Claims that are non-cognizable are precluded from review by this court

This Court finds the following allegations raised by Petitioner fail to allege grounds which would constitute a constitutional violation in the proceedings which resulted in Petitioner's conviction and sentence and are therefore barred from review by this habeas corpus court as non-cognizable under O.C.G.A. § 9-14-42(a).

- Claim XXXII of the amended petition dated 1/4/02 and Claim XXXIII of the amended petition dated 1/26/04, wherein Petitioner alleges that he is actually innocent and his continued incarceration or execution would violate his constitutional rights. This Court dismisses this claim non-cognizable as it fails to allege a substantial violation of constitutional rights in the proceedings which resulted in Petitioner's convictions and sentences.

- Claim XV of the amended petition dated 1/4/02, Claim XV of the amended petition dated 1/26/04 and Claim XX of the amended petition dated 7/10/06, wherein Petitioner alleges cumulative error. This Court dismisses this claim as non-cognizable as it fails to allege a substantial violation of constitutional rights in the proceedings which resulted in Petitioner's convictions and sentences, or, in the alternative, deny this claim as being without merit.

- Claim VII of the amended petition dated 1/4/02, Claim VII of the amended petition dated 1/26/04 and Claim XXII of the amended petition dated 7/10/06, wherein Petitioner alleges that he is

severely mentally ill and that under evolving standards of decency, his execution would therefore allegedly violate the Eighth Amendment to the United States Constitution and analogous provisions of the Georgia Constitution, a claim which Respondent denies. This Court dismisses this claim as non-cognizable because, since there is no constitutional right not to be executed if mentally ill, this claim fails to allege a substantial violation of constitutional rights in the proceedings which resulted in his conviction and sentence.

- Claim XX of the amended petition dated 1/4/02, Claim XX of the amended petition dated 1/26/04 and Claim XXVII of the amended petition dated 7/10/06, wherein Petitioner alleges that as provided for in the protocols promulgated by the Georgia Department of Corrections, lethal injection constitutes cruel and unusual punishment. This Court dismisses this claim as non-cognizable as it fails to allege a substantial violation of constitutional rights in the proceedings which resulted in his conviction and sentence or, in the alternative, deny this claim as being without merit.

- Claim XXI of the amended petition dated 1/26/04, wherein Petitioner alleges that to subject him to death by lethal injection would subject him to punishment under a law which is ex post facto. The Court dismisses this claim as non-cognizable as it fails to allege a substantial violation of constitutional rights in the proceedings which resulted in his conviction.

- Claim XXI of the amended petition dated 1/4/02 and Claim XXII of the amended petition dated

1/26/04, wherein Petitioner alleges that the statute in force at the time he was sentenced to death, O.C.G.A. § 17-10-38, which merely provides for the method of execution of a death sentence in Georgia, was declared unconstitutional in Dawson v. State, 274 Ga. 327 (2001), and that his death sentence is therefore null and void and may not be carried out. The Court dismisses this claim as non-cognizable as it fails to allege a substantial violation of constitutional rights in the proceedings which resulted in his conviction and sentence or, in the alternative, deny this claim as being without merit.

This Court dismisses these claims as non-cognizable as they fail to allege a substantial violation of constitutional rights in the proceedings which resulted in Petitioner's sentence.

All other claims made by Petitioner which are not specifically addressed by the court in this order are DENIED.

The Clerk of Court is directed to furnish a copy of this order to counsel for the parties.

AND SO ORDERED, this 4th day of December, 2013.

/s/ Richard M. Cowart
Richard M. Cowart
Judge, Superior Court

[Clerk's Certificate Omitted]

[SEAL] SUPREME COURT OF GEORGIA
Case No. S14E0771

Atlanta, November 03, 2014

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

TIMOTHY TYRONE FOSTER v. CARL HUMPHREY, WARDEN

From the Superior Court of Butts County.

Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur, except Benham, J., who dissents.

Trial Court Case No. 1989V2275

No. 14-8349

In The

Supreme Court of the United States

TIMOTHY TYRONE FOSTER,

Petitioner,

v.

BRUCE CHATMAN, WARDEN,

Respondent.

On Writ Of Certiorari To The Superior Court Of Butts County, Georgia

JOINT APPENDIX VOLUME II

STEPHEN B. BRIGHT*
PATRICK MULVANEY
PALMER SINGLETON
SOUTHERN CENTER FOR HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, GA 30303
404-688-1202
sbright@schr.org

Counsel for Petitioner

SAMUEL S. OLENS
Attorney General

BRITT GRANT
Solicitor General

BETH A. BURTON*
Deputy Attorney General

SABRINA D. GRAHAM
Senior Assistant Attorney General

RICHARD W. TANGUM
Assistant Attorney General

40 Capitol Square, SW
Atlanta, GA 30334
404-656-3499
bburton@law.ga.gov

Counsel for Respondent

**Counsel of Record*

Petition For Certiorari Filed January 30, 2015
Certiorari Granted May 26, 2015

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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Certified Copy of the District Attorney's File [H.T. 897-1000][1] (certified on June 6, 2006, admitted into evidence on Oct. 30, 2006, H.T. 20) 247

[1] "H.T. ___" refers to the designated page in the transcript from Foster's 2006 habeas corpus hearing, as on file with the Clerk of the Superior Court of Butts County, Georgia.

I certify that I am the District Attorney of Floyd County and that the foregoing is a true and correct copy of 103 pages of the State's case file regarding State v. Timothy Foster, Criminal Case No. 86-F-2218-2, as the same appears in the records of my office.

This 6th day of June, 2006.

Leigh E. Patterson
District Attorney
Rome Judicial Circuit

Sworn to and subscribed
before me this 6th day of
June, 2006.

NOTARY PUBLIC

My commission expires: 3/3/09

PLAINTIFF'S EXHIBIT 59

FLOYD COUNTY POLICE

201 WEST FIFTH AVENUE

ROME, GEORGIA 30161

On 4-30-87 at 9:20 hours, received call from confidential informant who told me that he/she was on the streets last night and heard talk that the girlfriend of Tim Foster was supposidly in the house when Queen White was killed. He/She also stated that she (girlfriend) helped carry some of the stolen items from the house. Talk was that Foster was not naming her (girlfriend) because he thought he stood better chance of insanity sentence.

This was the end of the conversation.

Capt. Tommy Shiflett

Capt. Tommy Shiflett
Floyd County Police Department

898

Would not warrant D.P. for Δ

① Mrs Ethel Fletcher -
V to chair practice -
back 8:50
saw nothing unusual - Heard Paper talking
but -

Δ's attorney might be here -

② Eva White -
81 - Photo of V - admitted
V - found next Am

Warrant - 16-3-5 Right/wrong

③ Betty White -

16/3-5 Division

STEVE LANIER
DISTRICT ATTORNEY
ROME JUDICIAL CIRCUIT
PHONE 404-291-5210
FLOYD COUNTY COURTHOUSE
ROME, GEORGIA 30161

TO: Doug Pullen

FROM: Steve Lanier

RE: Batson Challenge

DATE: August 21, 1987

Enclosed you will find as complete a copy of the respective jurors in my stated challenges. Some questions that I have regarding the way to handle the Batson issue on September 3 are as follows:

1. Jamie has taken great lengths to do a statistical study of how I used my strikes vs. acceptances and consequently has shown a discriminatory pattern in jury selection. Should I obtain the services of a statistician to refute these charges or what is the best way to handle this approach?

2. In light of the affidavits obtained from three of the four prospective jurors, should I have Clayton or myself interview these three jurors in order to try to refute any of these affidavits? I also need the law on affidavits vs. live testimony.

3. Should I also obtain an affidavit from Clayton Lundy stating that Mary Turner was not a sister of his and that he advised me not to select her or Marilyn Garrett or should I leave well enough alone?

4. Should we (you and I) be prepared to testify concerning our views on jury selection?

5. Should we obtain affidavits from Church of Christ indiviudals concerning Eddie Hood's position with the Church of Christ?

6. Should I obtain affidavits or how is the best way to approach the Head Start Affilitation of Marilyn Garrett as to that organizations affilitation with low income underprivileged children.?

7. What is the best way to handle the defense assertions that the state did not inquire of the jurors concerning their

biasis, prejudices, religious affilitations as opposed to questioning them uniformly as we did in the Batson Case in light of the decision in Gamble v. State which said that the District Attorney did not question them at all.

8. Are we going to have to be prepared to give our reasons for every acceptance, every strike of a particular juror, in light of the Gamble decision?

9. Please also review the Dorothy Black transcript which is enclosed for your reference. I am concerned about the jurors inability to state unequivocably that she could not oppose the death penalty in light of recent case decisions that say to do otherwise is reversable error to excuse her for cause. What is the best way to handle this situation if in fact she should not had been excused of cause?

10. How big a role is courtroom demeanor, .i.e eye contact, quick to respond, going to play in the black jurors that were struck as opposed to white jurors how were accepted by the state?

11. How detailed should we go in the acceptances of white jurors as opposed to the excuses of blacks with regard to these jurors social/economic back ground, education, religious beliefs, etc. Finnell told me yesterday that Jamie had received the brief and all the documents from the defense attorney in Gamble v. State and has used their outline extensively in their brief to support racial discrimination. Should we also obtain a copy of the state's brief and defense brief in that particular case and try to respond accordingly. I think the bottom line question is, even though Batson does not state that the prosecution has to explain its acceptances or its excuses of white jurors, the decision in Gamble clearly implies that to do otherwise would be reversible error. What is the best approach in this in light of the Gamble decision?

Thank you for your willingness to come up here on September 3rd. I look forward to seeing you on September 1st and hopefully we can spend the better part of the day trying to resolve these issues.

STEVE LANIER
DISTRICT ATTORNEY
ROME JUDICIAL CIRCUIT
PHONE: 404-291-5210
FLOYD COUNTY COURTHOUSE
ROME, GEORGIA 30161

November 16, 1987

Mr. Doug Pullen
Chief Assistant District Attorney
Chattahoochee Judicial Circuit
P.O. Box 1340
Columbus, Georgia 31993

RE: Timothy Foster Hearing
November 24, 1987, 10 A.M.

Dear Doug:

Enclosed is a copy of the "epistle" from Jamie Wyatt concerning Timothy Foster. I appreciate you agreeing to come up on the 24th (even though it is your anniversary) and I dare say the hearing should not take more than two hours. We should be through by lunch.

Please review the argument by Jamie Wyatt and I would appreciate any direction and advise as to which way to proceed. It appears the attack is a shotgun approach but I think we need to be unified in our presentation of rebuttal. Enclosed also is the Order by the Court on the Motion for Post-Judgment Discovery which Judge Frazier summarily dismissed.

I look forward to seeing you on the 24th. If you think it wise, I will be willing to drive to Columbus on either Friday or Monday to meet with you and discuss which way to proceed. Please let me know by calling 404-291-5210.

Sincerely,

Steve Lanier
District Attorney

SL/jf

Encls.

902

REPORT NO JUR100-01
REPORT DATE: 01/21/87
JUDGE: ROBERT G WALTHER

FLOYD COUNTY SUPERIOR COURT
TRAVERSE JURY
JURORS REQUESTED: 130

SD NO: 53 PAGE
APRIL 20, 1987
TIME: 9:30 A.M.

001. DEMPSEY NEAL BARRY
129 BARRON RD NE
ROME GA 30161

002. HARPER BONNIE Asst Dir Sesta Beauty Shop
3 PRIMULAS DR She is Ronnie Duck's Great Aunt
ROME GA 30161

003. LANIER SARAH Elaine Clk. Belk's
711 LEE AVENUE
ROME GA 30161

004. RATLIFF WILEY KELVIN Works At Redo pharmacist
4915 CALHOUN RD NE
ROME GA 30161

005. HACKETT MARY A husb. V. Pres. Valley Bond see attached sheet
3 MITCHELL CIR
ROME GA 30161

006. ~~CECIL KIP ALAN WM~~
52 PINERIDGE DR
SILVER CREEK GA 30173

007. BEYSIEGEL MARY ELLEN Co. Dept. Family & Ch. Ln. Services
4 NORTHWOOD DR
ROME GA 30161

008. CAGLE RICKEY J Fireman City of Rome see attached sheet
3651 CAVE SPRING RD SW
ROME GA 30161

009. HOOD EDDIE Age 17 Hipr. Ga. Math
18 COMELAND ST see attached sheet
ROME GA 30161

010. NICHOLSON JOYCE M tchr. Elm St. Elem. Sch.
5 CONWAY PL
ROME GA 30161

011. MCGINNIS NONA ADLINE Retired
7 MCGINNIS DR SE
ROME GA 30161

012. ~~CLEMENTS J TERRY~~
201 TURNER CHAPEL RD
ROME GA 30161

013. HOELZER MARGARET D husb. Pediatrist on Bond St.
907 EAST 2ND AVE
ROME GA 30161

014. STANSELL MARY H husb. works for Power Co.
1928 L TEXAS VLY RD NW
ROME GA 30161

015. WILSON LOUISE B Age 84 Retired owns her home see attached sheet
1603 FLANNERY ST
ROME GA 30161

016. BARBOGELLO MAUREEN B husb. is Superv. Traffic Sales Inc.
207 AUSBURN RD
ROME GA 30161

017. CARR ANNA W Retired
31 MAPLEWOOD SQ
ROME GA 30161

018. BING PATRICIA A OK
5452 FOSTER MILL RD SW
CAVE SPRINGS GA 30124

019. HINES CORRIE LEE B Age 65 Retired owns his home see attached sheet
121 CHAMBERS ST
ROME GA 30161

020. EVANS MYRTLE FRANCES
186 TURK MT RD NE
ARMUCHEE GA 30105

021. BLACK DOROTHY M
5117 ALA RD SW
ROME GA 30161

022. HARDGE EVELYN B age 69 Retired husb. owns their home
334 WEST ROSS ST
ROME GA 30161

023. COULTAS ANNE B works for Society Berry College
482 OLD BELLS FERRY RD
ROME GA 30161

024. HOBGOOD LOU ELLA husband is officer w/ Ga. State Bank
28 PINE VALLEY RD
ROME GA 30161

025. DEDEURWAERDER VICTOR Retired owns his
28 WINGFIELD ST
ROME GA 30161

026. ~~STANLEY RUBY BARNES~~
296 PAINTER RD NE
ROME GA 30161

027. HOUSE CHARLOTTE S Mrs White She is related to Mrs Hubbard neighbor of
333 FREEMAN FERRY RD husb w/Ga. Power
ROME GA 30161

028. JOHNSON BOBBIE JEAN B age 56
5 ROONEY RD
ROME GA 30161

REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
REPORT DATE: 01/21/87 TRAVERSE JURY APRIL 20, 1987
JUDGE: ROBERT G WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.

029. TATE RAY ALLEN
5809 BIG TEXAS VLY RD NW
ROME GA 30161

~~030. HIXON KENNETH LEWIS~~
18 KINGS COURT
ROME GA 30161

031. GRAVES BILLY E — Field Wkr. State Dept of Labor
8 MONTRE CIRCLE SE
SILVER CREEK GA 30173

~~032. SALMON JUDY ODELL~~
325 SOUTH McLIN ST.
ROME GA 30161

033. COCHRAN JAMES T — owns his home
6 LINDBERG DRIVE
ROME GA 30161

034. HAWKINS DEENA LOUISE
RT 1 FLOYD SPRINGS RD
ARMUCHEE GA 30105

035. TERRY THELMA B — husb. is mktg. Rep Ga. Power Co.
632 SPOUT SPRINGS RD
ROME GA 30161

036. HOWSE ELIZABETH B
886 HORSELEG CRK RD
ROME GA 30161

037. HILL DORSEY B — Retired owns his home
404 ROBINHOOD RD
ROME GA 30161

(038) TURNER MARY B — Age 37 office clk. N.W. Ga. Reg. Hosp. owns his home — see attached sheet
504 WOODBINE AVE
ROME GA 30161

039. HAULK CHARLES F — Prof. Berry College
109 JOHN ROSS DR
ROME GA 30161

(040) ~~BYSHOP~~ BISHOP BILLY P — see attached sheet
~~8 GREEN ST~~
~~ROME~~ GA 30161

(041) RICHARDSON BEVERLY KAY — Dental? See Attached Sheet
VALLEY ROAD
CAVE SPRINGS GA 30124

~~042. CAMP VICKY R~~
10 KYLE ST
ROME GA 30161

043. FUQUA MERRIAM A — Supervl. Journ. At Berry College
820 WARREN RD NE
ROME GA 30161

044. HALL DONALD H — works for S.R.R. Co.
79 HALL RD
SILVER CREEK GA 30173

045. MCMAHON GEORGE J — Retired owns his home
2624 LAKERIDGE CIR
ROME GA 30161

046. LEROY CLAIBORNE R — Works At Ga. Craft (owns his)
579 OLD ROCKMART RD SE
SILVER CREEK GA 30173

~~047. GARNER JAMES I JR~~
203 DODD ST
ROME GA 30161

048. HAMMOND SELENA D
3 FRANKLIN ST
ROME GA 30161

~~049. GRAY ROLAND E~~
206 BROOKWOOD AVE
ROME GA 30161

050. HENSON SCOTT R JR — Tech. N.W. Reg. Hosp. owns his home
100 CHATILLON ROAD
ROME GA 30161

~~051. HANSON LARRY J~~
23 FANNIN STREET
CAVE SPRINGS GA 30124

052. HOLT ROBIN A
100 DAVIS ROAD SW
CAVE SPRINGS GA 30124

(053) GREEN GERTRUDE — see attached sheet
950 OLD DALTON RD NE
ROME GA 30161

054. GALE ANNA JO
205 1/2 OAKWOOD ST
ROME GA 30161

~~055. GREEN DORIS ANN~~
305 PARK ST
LINDALE GA 30147

056. HOUSE VIRGINIA W
5 DON DR
ROME GA 30161

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REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
REPORT DATE: 01/21/87 TRAVERSE JURY APRIL 20, 1987
JUDGE: ROBERT G WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.

057. RHINEHART IRALYNE K
14 GARDEN CT S
ROME GA 30161

058. SMITH DONALD E
317 RIDGEDALE DRIVE
SILVER CREEK GA 30173

059. HOLLINGSWORTH FLORENCE W
11 WHEELER STREET
ROME GA 30161

060. BIRDSONG ELIZ D
345 BOOZE MTN RD
LINDALE GA 30147

061. GAISSON MARY K
4 RIVER ST
CAVE SPRINGS GA 30124

062. LYON JANE K
241 MARGO TR
ROME GA 30161

063. STRAUSS ROBERT JOSEPH
28 MARGO TRAIL
ROME GA 30161

064. ROBERSON ELBERT
9 GREENBRIAR LANE
ROME GA 30161

065. PHILLIPS BARBARA JEAN
24 BROOKVALLEY COURT
ROME GA 30161

066. WOFFORD FANNIE L
142 HASTY RD
ROME GA 30161

067. POWELL SHIRLEY A
E 11TH ST
ROME GA 30161

068. VANN ALVIS
491 LOONEY DR SW
ROME GA 30161

069. HOBAN JOHN W
12 NOTTINGHAM WAY NE
ROME GA 30161

070. HORNER STEPHEN RAY
117 HYCLIFF RD
ROME GA 30161

071. FINCHER LINDA KAY
14 RED FOX DRIVE
ROME GA 30161

072. HIBBERT MARGARET S
113 HOSEA AVE
ROME GA 30161

073. MILAM ROBERT E
SUMMITT DR
LINDALE GA 30147

074. HUNT ROBERT L
21 RIVERVIEW RD
ROME GA 30161

075. RUSSELL INDEE ANN
113 DELWOOD DR
ROME GA 30161

076. JACKSON SHIRLEY A
6 OREBURG RD
ROME GA 30161

077 HIBBERTS KATHY A
1060 ROSEDALE RD NE
ARMUCHEE GA 30105

078. WATERS VONDA F
209 OAKWOOD RD
ROME GA 30161

079. HARRISON A STEVEN
100 GRAY ROCK DRIVE
ROME GA 30161

080. ODOM JEFFREY KINSEY
47 LAKEVIEW DRIVE SE
LINDALE GA 30147

081. GARRETT C A JR
25 MAPLEWOOD SQ
ROME GA 30161

082. FREEMAN E LYNNE
48 GLENWOOD APTS
ROME GA 30161

083. BLACKMON ARLENE M
112 PARK BLVD
ROME GA 30161

084. BLANTON OWEN L
11 CRESTRIDGE DR
ROME GA 30161

905

REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
REPORT DATE: 01/21/87 TRAVERSE JURY APRIL 20, 1987
JUDGE: ROBERT G WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.

~~085. HUFF FRANCES C~~ rfd
301 CLARKE DR
ROME GA 30161

B. Age 35 works at Coffeeville mills
086. GARRETT MARILYN H
306 EAST 18TH ST
ROME GA 30161

087. MOORE IRMA B
RT 1 CULPEPPER RD
CALHOUN GA 30701

088. DUNCAN MARTHA F Clk. Renco Drugs
112 PENNCREST DR
ROME see attached sheet GA 30161

089. HOLDER TEDDY R
49 HAMMOND DR SW
ROME GA 30161

B. Age 73 husb. runs Beer Tavern on U.S. 27
090. TAYLOR LUCILE see attached sheet
513 WEST 12TH ST
ROME GA 30161

~~091. SALMON STACY LEIGH~~ rfd
18 DEPOT ST NE
ARMUCHEE GA 30105

092. FLOYD MARK EDWIN
5514 BIG TEXAS VLY RD
ROME GA 30161

Retired Homeowner
093. HILL MILDRED S
404 ROBINHOOD RD
ROME GA 30161

~~094. STEGALL SANDRA LEE~~ rfd
RT 1 OLD ROCKMART RD
SILVER CREEK GA 30173

095. CAMP MARY BOLT
291 ACRON RD SE
ROME GA 30161

~~096. HUFF ROBERT W JR~~ rfd
301 CLARKE DR
ROME GA 30161

Retired Homeowner
097. EARLY CAROLYN J
4 CHRISTOPHER PL
ROME GA 30161

B. age 61 Retired Lives w/his grandson Jr. works at Army Depot
098. BRAND EDGAR SR His grandson's wife owns Home
114 PERKINS ST At 114 Perkins
ROME See attached sheet GA 30161

099. HUBBARD HUGH L
71 FRED KELLEY RD
ROME GA 30161

~~100. DOROCHOFF OSCAR~~ rfd
311 EAST 9TH ST
ROME GA 30161

101. PLUMMER BETH B see attached sheet
1037 OLD RIVER RD SW
ROME GA 30161

~~102. MOORE ORPHA~~ rfd
986 BARKER RD SW
ROME GA 30161

103. GODFREY KENNETH LEON see attached sheet
592 GADSDEN RD SW
CAVE SPRINGS GA 30124

104. HYDE PAMELA M
408 SPRING VILLAGE RD
LINDALE GA 30147

105. GRAHAM JESSIE L
31 BLACK BLUFF RD
ROME GA 30161

Pres. Boss Benefits Inc. Homeowner
106. HUFFMAN DON M
792 NELSON RD
CAVE SPRINGS GA 30124

Retired Homeowner
107. HATCH LESLIE R see attached sheet
3 N PENNINGTON AVE
ROME GA 30161

108. HATCH ROY HOMER
217 FLORA AVE
ROME GA 30161

109. GREEN MICHAEL STEVEN
783 JONES MILL RD NE
ROME GA 30161

110. GRINDSTAFF BOBBIE M
47 DOGWOOD ST
ROME GA 30161

111. CADLE NANCY L see attached sheet
146 S AVERY RD SW
ROME GA 30161

~~112. SMITH MARGARET H~~ rfd
406 FRED KELLY RD NE
ROME GA 30161

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REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
REPORT DATE: 01/21/87 TRAVERSE JURY APRIL 20, 1987
JUDGE: ROBERT G WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.

113. BEVELS JAMES H — Wife w/ Wm Ellis Hazard
499 FRED KELLEY RD NE
ROME GA 30161

114. BERRY VIRGINIA C
87 ANTIOCH RD NW
ROME GA 30161

115. HOWELL WILLIAM JEFFREY — mach. oper. Bekaert Homeowner
25 VIEW DR SE
ROME GA 30161

116. MIXON LEWIS WM — Works w/ Atlanta Gas Light - Homeowner — Wife w/ GA Power Co
18 KINGS COURT
ROME GA 30161

117. SUMNERS ROBERT E — Dir. Berry College
43 WESTWOOD CIR
ROME GA 30161

118. FUQUA WALTER S
706 LEE AVE
ROME GA 30161

119. BETHEL MARGARET W — Retired - Homeowner
8 RIDGEWOOD RD
ROME GA 30161

120. WALTERS SHIRLEY Y — Works at Crestwell Nursing Home — Husband Employed at Celanese — attached sheet
10 WILLINGHAM ST
ROME GA 30161

121. HARTIS ELIZABETH A — Tel. oper. Horizon Carpets - Homeowner
201 B REECE ST
ROME GA 30161

122. TALIAFERRO ORVIL — GA-Kraft-C.A.
23 FAIRHAVEN DR NW
ROME GA 30161

123. HAGGARD LEONARD — Const. wkr. Union Pipeline Mech
30 ASH ST
ROME GA 30161

124. STARR NANCY S — Husb - Dentist
3 RIDGEWOOD RD
ROME GA 30161

125. SMITH CAROLYN T — Dir. Berry College — see attached sheet
BOX 599
MOUNT BERRY GA 30149

~~126. HOLCOMBE ODESSA MOORE~~ Aff
32 GLENVIEW DR NE
ROME GA 30161

127 EVANS ADELE A
311 EAST 2ND AVE
ROME GA 30161

128. COX CHARLES P — Retired Homeowner
611 CEDAR AVE
ROME GA 30161

129. OTWELL WM CRAIG JR — see attached sheet
758 HOLLAND RD NW
ROME GA 30161

~~130. WOODALL LILLIE C~~ Aff
109 HEMLOCK ST
ROME GA 30161

131 Wanda W. Walker — Husb. works for Management Co
571 Billy Boyle Rd — Homeowner

132 Linda Hancock — Husb. works for Shaw
6 Hacker Ct Rome — Homeowner

133 C. L. Fenton — Ofcr. Brandon Sec. Sta.
302 Kimball Rd S.W.
Rome Ga

134 Karen L Bagley — V.P. Alarion Plaza — Homeowner — attached sheet
35 Black Flint Rd

135 Becky Attaway
312 Cullen Dr

136 Darlene Graham — see attached sheet
214 Ghent St, NW

137 Husb. works for Rome police dept
Living Col Pkwy NW
Rome Ga

907

138. HAIGWOOD, DIANNE M. Home Health - R.N. Redmond Park Hosp.
13 John's Drive. N.E.

139. GUY C. GRIFFIN
382 Collier Rd. NE.

140. POOLE, Barbara Ann Secy. Hillcrest Chest
656 Abrams Rd.
Silver Creek, Ga.

141. HITT, Reid Work, Ga. Valley Veal Home owner
241 Cave Spring St.
Rome

142. NORTON, Helen G. Retired - Homeowner
514 Cooper Dr.

143. BOOKER, James H., Jr. Assist. Comptr. Hoffman, Robertson Ins (Hoffman's Son-In-Law) Home owner
511 E. 9th St.

144. WALKER, Ruby
2 Walker Dr.
Rome, Ga.

145. Chambers, Carol L. Works at Belk's
3108 Kingston Hwy. S.E.
Rome, Ga.

146. FREEMAN, Christopher E.
21 Highland Blvd. N.W.
Rome

147. MONTGOMERY, Idalee D. Sec. At Burley Mach.
49 Haywood Valley Rd. N.W.
Armuchee, Ga.

148. CROUCH, Barbara Husb. is Ins. Agent. Homeowner
103 Rolling Oaks Dr.

149. GILBREATH, Steven G. mach. oper. Apparel mfg.
1021 Booze Mtn. Rd.
Lindale,

150. SAUNDERS, Claude H.
504 E. 10th St.
Rome

151. LITTLEJOHN, Myra Jane B.
Atterian Heights
Rome

152. LOYD, James Wm. Truck driver for J T T Bakery
3121 Choun Hwy.

153. GARNER, Lynn Former sheriff of Floyd Co.
7 E. 19th St.

154. HOLLIFIELD, Inez Works at Coosa's Pharmacy Shipper Homeowner
517 Elliot Dr

155. TREADAWAY, Noel O. Former appl. GA Power Co
600 Billy Pyle Rd.

908

REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
REPORT DATE: 01/21/87 TRAVERSE JURY APRIL 20, 1987
JUDGE: ROBERT G WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.

001. DEMPSEY NEAL BARRY
129 BARRON RD NE
ROME GA 30161

002. HARPER BONNIE Owns Desoto Beauty Shop
3 PRIMULAS DR She is Ronnie Duck's great Aunt
ROME GA 30161

003. LANIER SARAH Elaine Clk. Belk's
711 LEE AVENUE
ROME GA 30161

004. RATLIFF WILEY KELVIN Works At Revco
4915 CALHOUN RD NE Pharmacist
ROME GA 30161

005. HACKETT MARY A husb. V. Pres. Valley Bond
3 MITCHELL CIR see attached sheet
ROME GA 30161

006. ~~CECIL KIP ALAN WM~~
~~52 PINERIDGE DR~~
~~SILVER CREEK GA 30173~~

007. BEYSIEGEL MARY ELLEN Co. Dept. Family & Child. Services
4 NORTHWOOD DR
ROME GA 30161

008. CAGLE RICKEY J Fireman City of Rome see attached sheet
3651 CAVE SPRING RD SW
ROME GA 30161

009. HOOD EDDIE Age 47 hipn. Ga. hosp. see attached sheet
13 COPELAND ST
ROME GA 30161

010. NICHOLSON JOYCE M tchr. Elm St. Elem. Sch.
5 CONWAY PL
ROME GA 30161

011. MCGINNIS NONA ADLINE Retired
7 MCGINNIS DR SE
ROME GA 30161

012. ~~CLEMENTS J TERRY~~
201 TURNER CHAPEL RD
ROME GA 30161

013. HOELZER MARGARET D husb. Podiatrist on Bd. st.
907 EAST 2ND AVE
ROME GA 30161

014. STANSELL MARY H husb. works for Power Co.
1928 L TEXAS VLY RD NW
ROME GA 30161

015. WILSON LOUISE Age 68 Retired owns her home see attached sheet
1603 FLANNERY ST
ROME GA 30161

016. BARBOGELLO MAUREEN B husb is Superv. Freight Sales Inc
207 AUSBURN RD
ROME GA 30161

017 CARR ANNA W Retired
31 MAPLEWOOD SQ
ROME GA 30161

018. BING PATRICIA A OK
5452 FOSTER MILL RD SW
CAVE SPRINGS GA 30124

019. HINES CORRIE LEE Age 65 Retired owns his home see attached sheet
121 CHAMBERS ST
ROME GA 30161

020. EVANS MYRTLE FRANCES
186 TURK MT RD NE
ARMUCHEE GA 30105

021 BLACK DOROTHY M
5117 ALA RD SW
ROME GA 30161

022. HARDGE EVELYN Age 69 Retired husb. works for Rome Ga. Realty
334 WEST ROSS ST
ROME GA 30161

023. COULTAS ANNE B Works for Security Bond College
482 OLD BELLS FERRY RD
ROME GA 30161

024. HOBGOOD LOU ELLA husband is officer w/ Ga. State Bank
28 PINE VALLEY RD
ROME GA 30161

025. DEDEURWAERDER VICTOR Retired owns his
28 WINGFIELD ST
ROME GA 30161

026. ~~STANLEY RUBY BARNES~~
296 PAINTER RD NE
ROME GA 30161

027 HOUSE CHARLOTTE She is related to Mrs Hubbard Neighbor of Mrs Wade
333 FREEMAN FERRY RD husb. w/Ga. Power
ROME GA 30161

028. JOHNSON BOBBIE JEAN Age 56
5 ROONEY RD
ROME GA 30161

REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
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JUDGE: ROBERT G WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.

029. TATE RAY ALLEN
5809 BIG TEXAS VLY RD NW
ROME GA 30161

~~030. MIXON KENNETH LEWIS~~
18 KINGS COURT
ROME GA 30161

031. GRAVES BILLY E
8 MONTRE CIRCLE SE
SILVER CREEK GA 30173

~~032. SALMON JODY ODELL~~
325 SOUTH McLIN ST.
ROME GA 30161

033. COCHRAN JAMES T
6 LINDBERG DRIVE
ROME GA 30161

034. HAWKINS DEENA LOUISE
RT 1 FLOYD SPRINGS RD
ARMUCHEE GA 30105

035. TERRY THELMA B
632 SPOUT SPRINGS RD
ROME GA 30161

036. HOWSE ELIZABETH B
886 HORSELEG CRK RD
ROME GA 30161

037. HILL DORSEY B
404 ROBINHOOD RD
ROME GA 30161

(038) TURNER MARY B
504 WOODBINE AVE
ROME GA 30161

039. HAULK CHARLES F
109 JOHN ROSS DR
ROME GA 30161

(040.) BISHOP BILLY P
8 GREEN ST
ROME GA 30161

(041) RICHARDSON BEVERLY KAY
VALLEY ROAD
CAVE SPRINGS GA 30124

~~042. CAMP VICKY R~~
10 KYLE ST
ROME GA 30161

043. FUQUA MERRIAM A
020 WARREN RD NE
ROME GA 30161

044. HALL DONALD H
79 HALL RD
SILVER CREEK GA 30173

045. MCMAHON GEORGE J
2624 LAKERIDGE CIR
ROME GA 30161

046. LEROY CLAIBORNE R
579 OLD ROCKMART RD SE
SILVER CREEK GA 30173

~~047. GARDNER JAMES L JR~~
203 DODD ST
ROME GA 30161

048. HAMMOND SELENA D
3 FRANKLIN ST
ROME GA 30161

~~049. GRAY ROLAND L~~
206 BROOKWOOD AVE
ROME GA 30161

050. HENSON SCOTT R JR
100 CHATILLON ROAD
ROME GA 30161

~~051. HANSON LARRY J~~
23 FANNIN STREET
CAVE SPRINGS GA 30124

052. HOLT ROBIN A
100 DAVIS ROAD SW
CAVE SPRINGS GA 30124

(053) GREEN GERTRUDE
950 OLD DALTON RD NE
ROME GA 30161

054. GALE ANNA JO
205 1/2 OAKWOOD ST
ROME GA 30161

~~055. GREEN DORIS ANN~~
305 PARK ST
LINDALE GA 30147

056. HOUSE VIRGINIA W
5 DON DR
ROME GA 30161

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REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
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JUDGE: ROBERT G WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.

057. RHINEHART IRALYNE K
14 GARDEN CT S
ROME GA 30161

058. ~~SMITH DONALD E~~ Cpt
317 RIDGEDALE DRIVE
SILVER CREEK GA 30173

059. ~~HOLLINGSWORTH FLORENCE W~~
11 WHEELER STREET
ROME GA 30161

060. ~~BIRDSONG ELIZ D~~
345 BOOZE MTN RD
LINDALE GA 30147

061. ~~GRIGGSON MARY K~~
4 RIVER ST
CAVE SPRINGS GA 30124

062. LYON JANE K
241 MARGO TR
ROME GA 30161

063. STRAUSS ROBERT JOSEPH
28 MARGO TRAIL
ROME GA 30161

064. ROBERSON ELBERT
9 GREENBRIAR LANE
ROME GA 30161

065. PHILLIPS BARBARA JEAN
24 BROOKVALLEY COURT
ROME GA 30161

066. WOFFORD FANNIE L
142 HASTY RD
ROME GA 30161

067. POWELL SHIRLEY A
E 11TH ST
ROME GA 30161

068. VANN ALVIS
491 LOONEY DR SW
ROME GA 30161

069. HOBAN JOHN W
12 NOTTINGHAM WAY NE
ROME GA 30161

070. HORNER STEPHEN RAY
117 HYCLIFF RD
ROME GA 30161

071. FINCHER LINDA KAY
14 RED FOX DRIVE
ROME GA 30161

072. HIBBERT MARGARET S
113 HOSEA AVE
ROME GA 30161

073. MILAM ROBERT E
SUMMITT DR
LINDALE GA 30147

074. ~~HUNT ROBERT L~~
21 RIVERVIEW RD
ROME GA 30161

075. ~~RUSSELL INDEE ANN~~
113 DELWOOD DR
ROME GA 30161

076. JACKSON SHIRLEY A
6 OREBURG RD
ROME GA 30161

077. HIBBERTS KATHY A
1060 ROSEDALE RD NE
ARMUCHEE GA 30105

078. WATERS VONDA F
209 OAKWOOD RD
ROME GA 30161

079. HARRISON A STEVEN
100 GRAY ROCK DRIVE
ROME GA 30161

080. ODOM JEFFREY KINSEY
47 LAKEVIEW DRIVE SE
LINDALE GA 30147

081. GARRETT C A JR
25 MAPLEWOOD SQ
ROME GA 30161

082. FREEMAN E LYNNE
48 GLENWOOD APTS
ROME GA 30161

083. BLACKMON ARLENE M
1122 PARK BLVD
ROME GA 30161

084. ~~BLANTON OWEN L JR~~
11 CRESTRIDGE DR
ROME GA 30161

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REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE 4
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~~085. HOFF FRANCES C~~ ~~ff~~
301 CLARKE DR
ROME GA 30161

Age 35 works at PrePaid mails
086. GARRETT MARILYN H
306 EAST 18TH ST
ROME GA 30161

087. MOORE IRMA B
RT 1 CULPEPPER RD
CALHOUN GA 30701

088. DUNCAN MARTHA F Clk. Reece Drugs
112 PENNCREST DR
ROME see attached sheet GA 30161

089. HOLDER TEDDY R
49 HAMMOND DR SW
ROME GA 30161

Age 73 husb. runs Beer Tavern on U.S. 27
090. TAYLOR LUCILE see attached sheet
513 WEST 12TH ST
ROME GA 30161

~~091. CALHOON STACY LEIGH~~ ~~ff~~
18 DEPOT ST NE
ARMUCHEE GA 30105

092. FLOYD MARK EDWIN
5514 BIG TEXAS VLY RD
ROME GA 30161

Retired Homeowner
093. HILL MILDRED S
404 ROBINHOOD RD
ROME GA 30161

~~094. STEGALL SANDRA LEE~~ ~~ff~~
RT 1 OLD ROCKMART RD
SILVER CREEK GA 30173

095. CAMP MARY BOLT
291 ACRON RD SE
ROME GA 30161

~~096. HOFF ROBERT W JR~~ ~~ff~~
301 CLARKE DR
ROME GA 30161

Retired Homeowner
097. EARLY CAROLYN J
4 CHRISTOPHER PL
ROME GA 30161

Age 61 Retired Lineman/Foreman Jr. works at Rag Shop
098. BRAND EDGAR SR His daughter & wife own home
114 PERKINS ST At 114 Perkins
ROME see attached sheet GA 30161

099. HUBBARD HUGH L
71 FRED KELLEY RD
ROME GA 30161

~~100. BOROCHOFF OSCAR~~ ~~ff~~
311 EAST 9TH ST
ROME GA 30161

101. PLUMMER BETH see attached sheet
1037 OLD RIVER RD SW
ROME GA 30161

~~102. MOORE ORPHA~~ ~~ff~~
988 BARKER RD SW
ROME GA 30161

103. GODFREY KENNETH LEON see attached sheet
592 GADSDEN RD SW
CAVE SPRINGS GA 30124

104. HYDE PAMELA M
408 SPRING VILLAGE RD
LINDALE GA 30147

105. GRAHAM JESSIE L
31 BLACK BLUFF RD
ROME GA 30161

Pres. Bus. Benefits Inc. Homeowner
106. HUFFMAN DON M
792 MELSON RD
CAVE SPRINGS GA 30124

Retired Homeowner
107. HATCH LESLIE R see attached sheet
3 N PENNINGTON AVE
ROME GA 30161 B15

108. HATCH ROY HOMER
217 FLORA AVE
ROME GA 30161

109. GREEN MICHAEL STEVEN
783 JONES MILL RD NE
ROME GA 30161

110. GRINDSTAFF BOBBIE M
47 DOGWOOD ST
ROME GA 30161

111. CADLE NANCY L see attached sheet
146 S AVERY RD SW
ROME GA 30161

~~112. SMITH MARGARET K~~ ~~ff~~
406 FRED KELLY RD NE
ROME GA 30161

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REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE: 1
REPORT DATE: 01/21/87 TRAVERSE JURY APRIL 20, 1987
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113. BEVELS JAMES H
499 FRED KELLEY RD NE
ROME GA 30161

114. BERRY VIRGINIA C
87 ANTIOCH RD NW
ROME GA 30161

115. HOWELL WILLIAM JEFFREY
25 VIEW DR SE
ROME GA 30161

116. MIXON LEWIS WM
18 KINGS COURT
ROME GA 30161

117. SUMNERS ROBERT E
43 WESTWOOD CIR
ROME GA 30161

118. FUQUA WALTER S
706 LEE AVE
ROME GA 30161

119. BETHEL MARGARET W
8 RIDGEWOOD RD
ROME GA 30161

120. WALTERS SHIRLEY Y
10 WILLINGHAM ST
ROME GA 30161

121. HARTIS ELIZABETH A
201 B REECE ST
ROME GA 30161

122. TALIAFERRO ORVIL K
23 FAIRHAVEN DR NW
ROME GA 30161

123. HAGGARD LEONARD
30 ASH ST
ROME GA 30161

124. STARR NANCY S
3 RIDGEWOOD RD
ROME GA 30161

125. SMITH CAROLYN T
BOX 599
MOUNT BERRY GA 30149

~~126. HOLCOMBE OBESSIA MOORE~~
32 GLENVIEW DR NE
ROME GA 30161

127. EVANS ADELE A
311 EAST 2ND AVE
ROME GA 30161

128. COX CHARLES P
611 CEDAR AVE
ROME GA 30161

129. OTWELL WM CRAIG JR
758 HOLLAND RD NW
ROME GA 30161

~~130. WOODALL LILLIE C~~
109 HEMLOCK ST
ROME GA 30161

131 Wanda D Mattox
521 Billy Pope Rd

132 Louise Hawkins
6 Jarvis St Lot

133 Q L Lanton
302 Kimball St S W
Cave Spr

134 Howard L Bagley
35 Black Butt Rd

135 Kirk Shedd
302 Walker St

136 Doreen Strahan
Rt 6 Shorter Rd

137 Alex Hinkle
Hwy 20 Dawson Rd N E
Armuchee Ga

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138. HAIGWOOD, DIANNE M. Homemaker - wife of Richard Park U.P.
13 John's Drive. N.E.

139. GUY C. GRIFFIN
382 Collier Rd. NE.

140. POOLE, Barbara Ann one of Elizabeth Ann's sisters
656 Abrams Rd.
Silver Creek, Ga.

141. HITT, Reid Works for Valley Yard Homemaker
241 Cave Spring St.
Rome

142. NORTON, Helen G. Retired - Homemaker
514 Cooper Dr.

143. BOOKER, James H., Jr. Assoc/w Lanier, Hollman, Robertson Ins (Hollman's Son-In-Law) Homeowner
511 E. 9th St.

144. WALKER, Ruby
2 Walker Dr.
Rome, Ga.

145. Chambers, Carol L. works at Belk's
3108 Kingston Hwy. S.E.
Rome, Ga.

146. FREEMAN, Christopher E.
21 Highland Blvd. N.W.
Rome

147. MONTGOMERY, Idalee D. Sec at Battery Mart.
49 Haywood Valley Rd. N.W.
Armuchee, Ga.

148. CROUCH, Barbara Work in Ins Agency Homemaker
103 Rolling Oaks Dr.

149. GILBREATH, Steven G. mach. oper. Pippen mfg.
1021 Booze Mtn. Rd.
Lindale,

150. SAUNDERS, Claude H.
504 E. 10th St.
Rome

151. LITTLEJOHN, Myra Jane B.
Atterian Heights
Rome

152. LOYD, James Wm. Truck driver for ITT Baking
3121 Choun Hwy.

153. GARNER, Lynn Former sheriff of Floyd Co.
7 E. 19th St.

154. HOLLIFIELD, Inez Works at Church's Chicken Homemaker
517 Elliot Dr.

155. TREADAWAY, Noel O. Owner appr. GA. Krafts Inc
600 Billy Pyle Rd.

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REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
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001. DEMPSEY NEAL BARRY
129 BARRON RD NE
ROME GA 30161

002. HARPER BONNIE
3 PRIMULAS DR
ROME GA 30161

003. LANIER SARAH
711 LEE AVENUE
ROME GA 30161

004. RATLIFF WILEY KELVIN
4915 CALHOUN RD NE
ROME GA 30161

005. HACKETT MARY A
3 MITCHELL CIR
ROME GA 30161

006. CECIL KIP ALAN MM
52 PINERIDGE DR
SILVER CREEK GA 30173

007. BEYSIEGEL MARY ELLEN
4 NORTHWOOD DR
ROME GA 30161

008. CAGLE RICKEY J
3651 CAVE SPRING RD SW
ROME GA 30161

009. HOOD EDDIE
13 COPELAND ST
ROME GA 30161

010. NICHOLSON JOYCE M
5 CONWAY PL
ROME GA 30161

011. MCGINNIS NONA ADLINE
7 MCGINNIS DR SE
ROME GA 30161

012. CLEMENTS J TERRY
201 TURNER CHAPEL RD
ROME GA 30161

013. HOELZER MARGARET D
907 EAST 2ND AVE
ROME GA 30161

014. STANSELL MARY H
1928 L TEXAS VLY RD NW
ROME GA 30161

015. WILSON LOUISE
1603 FANNERY ST
ROME GA 30161

016. BARBOGELLO MAUREEN B
207 AUSBURN RD
ROME GA 30161

017. CARR ANNA L
31 MAPLEWOOD DR
ROME GA 30161

018. BING PATRICIA A
5452 FOSTER MILL RD SW
CAVE SPRINGS GA 30124

019. HINES DORRIS LEE
121 CHAMBERS ST
ROME GA 30161

020. EVANS MYRTLE FRANCES
186 TURK MT RD NE
ARMUCHEE GA 30105

021. BLACK DOROTHY M
5117 ALA RD SW
ROME GA 30161

022. HARDGE EVELYN
334 WEST ROSS ST
ROME GA 30161

023. COULTAS ANNE B
482 OLD BELLS FERRY RD
ROME GA 30161

024. HOBGOOD LOU ELLA
28 PINE VALLEY RD
ROME GA 30161

025. DEDEURWAERDER VICTOR
28 WINGFIELD ST
ROME GA 30161

026. STANLEY RUBY BARNES
296 PAINTER RD NE
ROME GA 30161

027. HOUSE CHARLOTTE S
303 FREEMAN FERRY RD
ROME GA 30161

028. JOHNSON BOBBIE JEAN
5 ROONEY RD
ROME GA 30161

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REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
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029. TATE RAY ALLEN
5809 BIG TEXAS VLY RD NW
ROME GA 30161

~~030. HIXON KENNETH LEWIS~~
18 KINGS COURT
ROME GA 30161

Field Wkr. State Dept of Labor
031. GRAVES BILLY E
8 MONTRE CIRCLE SE
SILVER CREEK GA 30173

~~032. SALMON JUDY ODELL~~
325 SOUTH McLIN ST.
ROME GA 30161

owns his home
033. COCHRAN JAMES T
6 LINDBERG DRIVE
ROME GA 30161

034. HAWKINS DEENA LOUISE
RT 1 FLOYD SPRINGS RD
ARMUCHEE GA 30105

husb. is mktg Rep GA Power Co.
035. TERRY THELMA B
632 SPOUT SPRINGS RD
ROME GA 30161

036. HOWSE ELIZABETH B
886 HORSELEG CRK RD
ROME GA 30161

Retired owns his home
037. HILL DORSEY B
404 ROBINHOOD RD
ROME GA 30161

A Page 37 office Clk. N.W. Ga Reg. Hosp.
(038) TURNER MARY B owns his home
504 WOODBINE AVE
ROME GA 30161

Prof. Berry College
039. HAULK CHARLES F
109 JOHN ROSS DR
ROME GA 30161

(040.) BISHOP BILLY
8 GREEN
ROME GA 30161

(041.) RICHARDSON BEVERLY KAY
VALLEY ROAD
CAVE SPRINGS GA 30124

~~042. CAMP VICKY R~~
10 KYLE ST
ROME GA 30161

Support Income At Berry College
043. FUQUA MERRIAM A
820 WARREN RD NE
ROME GA 30161

works for S.R.Railway
044. HALL DONALD H
79 HALL RD
SILVER CREEK GA 30173

Retired owns his home
045. MCMAHON GEORGE J
2624 LAKERIDGE CIR
ROME GA 30161

Works at Ga Kraft owns his
046. LEROY CLAIBORNE R
579 OLD ROCKMART RD SE
SILVER CREEK GA 30173

~~047. GARDNER JAMES C JR~~
203 DODD ST
ROME GA 30161

Jan for the daughter
048. HAMMOND SELENA D
3 FRANKLIN ST
ROME GA 30161

~~049. GRAY ROLAND L~~
206 BROOKWOOD AVE
ROME GA 30161

Tech. N.W. Reg. Hosp. owns his home
050. HENSON SCOTT R JR
100 CHATELDON ROAD
ROME GA 30161

~~051. HANSON LARRY J~~
23 FANNIN STREET
CAVE SPRINGS GA 30124

052. HOLT ROBIN A
100 DAVIS ROAD SW
CAVE SPRINGS GA 30124

(053.) GREEN GERTRUDE
950 OLD DALTON RD NE
ROME GA 30161

054. GALE ANNA JO
205 1/2 OAKWOOD ST
ROME GA 30161

~~055. GREEN BORIS ANN~~
305 PARK ST
LINDALE GA 30147

056. HOUSE VIRGINIA W
5 DON DR
ROME GA 30161

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REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
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057. RHINEHART IRALYNE K
14 GARDEN CT S
ROME GA 30161

~~058. SMITH DONALD E~~
317 RIDGEDALE DRIVE
SILVER CREEK GA 30173

~~059. HOLLINGSWORTH FLORENCE W~~
11 WHEELER STREET
ROME GA 30161

~~060. BIRDSONG BETTY D~~
345 BOOZE MTN RD
LINDALE GA 30147

~~061. GAITSCOK MARY K~~
4 RIVER ST
CAVE SPRINGS GA 30124

062. LYON JANE K
241 MARGO TR
ROME GA 30161

063. STRAUSS ROBERT JOSEPH
28 MARGO TRAIL
ROME GA 30161

064. ROBERSON ELBERT
9 GREENBRIAR LANE
ROME GA 30161

065. PHILLIPS BARBARA JEAN
24 BROOKVALLEY COURT
ROME GA 30161

066. WOFFORD FANNIE L
142 HASTY RD
ROME GA 30161

067. POWELL SHIRLEY A
E 11TH ST
ROME GA 30161

068. VANN ALVIS
491 ROONEY DR SW
ROME GA 30161

069. HOBAN JOHN W
12 NOTTINGHAM WAY NE
ROME GA 30161

070. HORNER STEPHEN RAY
117 HYCLIFF RD
ROME GA 30161

071. FINCHER LINDA KAY
14 RED FOX DRIVE
ROME GA 30161

072. HIBBERT MARGARET S
113 HOSEA AVE
ROME GA 30161

073. MILAM ROBERT E
SUMMITT DR
LINDALE GA 30147

~~074. HUNT ROBERT L~~
21 RIVERVIEW RD
ROME GA 30161

~~075. RUSSELL INDEE ANN~~
113 DELWOOD DR
ROME GA 30161

076. JACKSON SHIRLEY A
6 OREBURG RD
ROME GA 30161

077. HIBBERTS KATHY A
1060 ROSEDALE RD NE
ARMUCHEE GA 30105

078. WATERS VONDA F
209 OAKWOOD RD
ROME GA 30161

079. HARRISON A STEVEN.
100 GRAY ROCK DRIVE
ROME GA 30161

080. ODOM JEFFREY KINSEY
47 LAKEVIEW DRIVE SE
LINDALE GA 30147

081. GARRETT C A JR
25 MAPLEWOOD SQ
ROME GA 30161

082. FREEMAN E LYNNE
48 GLENWOOD APTS
ROME GA 30161

083. BLACKMON ARLENE M
1120 PARK BLVD
ROME GA 30161

~~084. BEANTON OWEN L~~
11 CRESTRIDGE DR
ROME GA 30161

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~~085. HOFF FRANCES C~~
301 CLARKE DR
ROME GA 30161

086. GARRETT MARILYN H
306 EAST 18TH ST
ROME GA 30161

087. MOORE IRMA B
RT 1 CULPEPPER RD
CALHOUN GA 30701

088. DUNCAN MARTHA F
112 PENNCREST DR
ROME GA 30161

089. HOLDER TEDDY R
49 HAMMOND DR SW
ROME GA 30161

090. TAYLOR LUCILE
513 WEST 12TH ST
ROME GA 30161

~~091. GALMON STACY LEIGH~~
18 DEPOT ST NE
ARMUCHEE GA 30105

092. FLOYD MARK EDWIN
5514 BIG TEXAS VLY RD
ROME GA 30161

093. HILL MILDRED S
404 ROBINHOOD RD
ROME GA 30161

~~094. STEGALL SANDRA LEE~~
RT 1 OLD ROCKMART RD
SILVER CREEK GA 30173

095. CAMP MARY BOLT
291 AARON RD SE
ROME GA 30161

~~096. HOFF ROBERT W JR~~
301 CLARKE DR
ROME GA 30161

097. EARLY CAROLYN J
4 CHRISTOPHER PL
ROME GA 30161

098. BRAND EDGAR SR
114 PERKINS ST
ROME GA 30161

099. HUBBARD HUGH L
71 FRED KELLEY RD
ROME GA 30161

~~100. BOROCHOFF OSCAR~~
311 EAST 9TH ST
ROME GA 30161

101. PLUMMER BETH
1037 OLD RIVER RD SW
ROME GA 30161

~~102. MOORE ORPHA~~
988 BARKER RD SW
ROME GA 30161

103. GODFREY KENNETH LEON
592 GADSDEN RD SW
CAVE SPRINGS GA 30124

104. HYDE PAMELA M
408 SPRING VILLAGE RD
LINDALE GA 30147

105. GRAHAM JESSIE L
31 BLACK BLUFF RD
ROME GA 30161

106. HUFFMAN DON M
792 MELSON RD
CAVE SPRINGS GA 30124

107. HATCH LESLIE R
3 N PENNINGTON AVE
ROME GA 30161

108. HATCH ROY HOMER
217 FLORA AVE
ROME GA 30161

109. GREEN MICHAEL STEVEN
783 JONES MILL RD NE
ROME GA 30161

110. GRINDSTAFF BOBBIE M
47 DOGWOOD ST
ROME GA 30161

111. CADLE NANCY L
146 S AVERY RD SW
ROME GA 30161

~~112. SMITH MARGARET~~
408 FRED KELLY RD NE
ROME GA 30161

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113. BEVELS JAMES H — wife w/ World Bazaar
499 FRED KELLEY RD NE
ROME GA 30161

114. BERRY VIRGINIA G
87 ANTIOCH RD NW
ROME GA 30161

115. HOWELL WILLIAM JEFFREY — mach. oper. Bekaert Homeowner
25 VIEW DR SE
ROME GA 30161

116. MIXON LEWIS WM — works w/Atlanta Gas Light - Homeowner - wife w/GA Power Co.
18 KINGS COURT
ROME GA 30161

117. SUMNERS ROBERT E — Dir. Berry College
43 WESTWOOD CIR
ROME GA 30161

118. FUQUA WALTER S
706 LEE AVE
ROME GA 30161

119. BETHEL MARGARET W — Retired - Homeowner
8 RIDGEWOOD RD
ROME GA 30161

120. WALTERS SHIRLEY Y — Works at Crestwell Nursing Home Homeowner see attached sheet
10 WILLINGHAM ST
ROME GA 30161

121. HARTIS ELIZABETH A — Tel. wkr. Horizon Carpets. Homeowner
201 B REECE ST
ROME GA 30161

122. TALIAFERRO ORVIL K — GA Kraft-B.K.
23 FAIRHAVEN DR NW
ROME GA 30161

123. HAGGARD LEONARD — Const. wkr. - Union Pipefitter
30 ASH ST
ROME GA 30161

124. STARR NANCY S — husb. Doctor
3 RIDGEWOOD RD
ROME GA 30161

125. SMITH CAROLYN T — Dir. Berry College see attached sheet
BOX 599
MOUNT BERRY GA 30149

~~126. HOLCOMBE ODESSA MOORE~~
32 GLENVIEW DR NE
ROME GA 30161

127. EVANS ADELE A
311 EAST 2ND AVE
ROME GA 30161

128. COX CHARLES P — Retired Homeowner
611 CEDAR AVE
ROME GA 30161

129. OTWELL WM CRAIG JR — see attached sheet
758 HOLLAND RD NW
ROME GA 30161

~~130. WOODALL LILLIE O~~
109 HEMLOCK ST
ROME GA 30161

131. Wanda D. Watts — husb. works for Management GA. Homeowner
521 Billy Lyle Rd

132. Louise Hancock — husb. works for Sears Homeowner
6 Standen Ct Lovell

133. A. L. Branton — Oper. Branton Serv. Sta.
302 Randall Rd S.W.
Cave Spa

134. Homer D. Bagley — V.A. Blanton Plan see attached sheet Homeowner
35 Black Bluff Rd

135. Hiatt Shedd
302 Walton St

136. Warren Graham — see attached sheet
Rt 6 Hasty Rd

137. Ina Hester — husb. works for Rothl office Supp
Rt 9 Old Dawsonville Rd N.E.
Atlanta, Ga.

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138. HAIGWOOD, DIANNE M. Homemaker - Works At Redmond Park Hosp.
13 John's Drive. N.E.

139. GUY C. GRIFFIN
382 Collier Rd. NE.

140. POOLE, Barbara Ann are attached sheet
656 Abrams Rd.
Silver Creek, Ga.

141. HITT, Reid Works for Valley Vend Home & Farm
241 Cave Spring St.
Rome

142. NORTON, Helen G. Retired - Homemaker
514 Cooper Dr.

143. BOOKER, James H., Jr. Assoc/w Lanier, Huffman, Robertson Ins. (Huffmans Son-In-Law) Homeowner
511 E. 9th St.

144. WALKER, Ruby
2 Walker Dr.
Rome, Ga.

145. Chambers, Carol L. Works At Belk's
3108 Kingston Hwy. S.E.
Rome, Ga.

146. FREEMAN, Christopher E.
21 Highland Blvd. N.W.
Rome

147. MONTGOMERY, Idalee D. Sec. At Battery Mach.
49 Haywood Valley Rd. N.W.
Armuchee, Ga.

148. CROUCH, Barbara Husb. is Ins. Agent - Homeowner
103 Rolling Oaks Dr.

149. GILBREATH, Steven G. mach. oper. Peppercll mfg.
1021 Booze Mtn. Rd.
Lindale,

150. SAUNDERS, Claude H.
504 E. 10th St.
Rome

151. LITTLEJOHN, Myra Jane B.
Atterian Heights
Rome

152. LOYD, James Wm. Truck driver for Ivy Baking
3121 Choun Hwy.

GARNER, Lynn Former sheriff of Floyd C.
7 E. 19th St.

154. HOLLIFIELD, Inez Works at Carrie's Boutique Homemaker
517 Elliot Dr.

155. TREADAWAY, Noel O. Owns apts. on E. Rome Hwy.
600 Billy Pyle Rd.

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REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
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001. DEMPSEY NEAL BARRY
129 BARRON RD NE
ROME GA 30161

002. HARPER BONNIE Asst. Dr Seth Beauty Shop She is Ronnie Duck's great Aunt
3 PRIMULAS DR
ROME GA 30161

003. LANIER SARAH Elaine Clk. Belk's
711 LEE AVENUE
ROME GA 30161

004. RATLIFF WILEY KELVIN Works at Reno pharmacist
4915 CALHOUN RD NE
ROME GA 30161

005. HACKETT MARY A husb. V. Pres. Valley Bond see attached sheet
3 MITCHELL CIR
ROME GA 30161

006. CECIL KIP ALAN WM
52 PINERIDGE DR
SILVER CREEK GA 30173

007. BEYSIEGEL MARY ELLEN Co. Dept Family & Child. Services
4 NORTHWOOD DR
ROME GA 30161

008. CAGLE RICKEY J Fireman City of Rome see attached sheet
3651 CAVE SPRING RD SW
ROME GA 30161

009. HOOD EDDIE Age 47 h/p. Ga. Kraft see attached sheet
13 COPELAND ST
ROME GA 30161

010. NICHOLSON JOYCE M Tchr. Elm St. Elem. Sch.
5 CONWAY PL
ROME GA 30161

011. MCGINNIS NONA ADLINE Retired
7 MCGINNIS DR SE
ROME GA 30161

012. CLEMENTS J TERRY
201 TURNER CHAPEL RD
ROME GA 30161

013. HOELZER MARGARET D husb. Pediatrist on Bird St.
907 EAST 2ND AVE
ROME GA 30161

014. STANSELL MARY H husb. works for Power Co.
1928 E TEXAS VLY RD NW
ROME GA 30161

015. WILSON LOUISE Age 69 Retired owns her home see attached sheet
1603 FLANNERY ST
ROME GA 30161

016. BARBOGELLO MAUREEN B husb. is Superv. Triple H Sales Inc.
207 AUSBURN RD
ROME GA 30161

017. CARR ANNA W Retired
31 MAPLEWOOD SQ
ROME GA 30161

018. BING PATRICIA A OK
5452 FOSTER MILL RD SW
CAVE SPRINGS GA 30124

019. HINES CORRIE LEE Age 65 Retired owns his home see attached sheet
121 CHAMBERS ST
ROME GA 30161

020. EVANS MYRTLE FRANCES
186 TURK MT RD NE
ARMUCHEE GA 30105

021. BLACK DOROTHY M
5117 ALA RD SW
ROME GA 30161

022. HARDGE EVELYN Age 64 Retired her husb. owns their home
334 WEST ROSS ST
ROME GA 30161

023. COULTAS ANNE B Works Ga. Soc. Sec. Berry College
482 OLD BELLS FERRY RD
ROME GA 30161

024. HOBGOOD LOU ELLA husband is officer w/ Ga. State Bank
28 PINE VALLEY RD
ROME GA 30161

025. DEDEURWAERDER VICTOR Retired owns his
28 WINGFIELD ST
ROME GA 30161

026. STANLEY RUBY BARNES
296 PAINTER RD NE
ROME GA 30161

027 HOUSE CHARLOTTE Smith She is related to Mrs Hubbard's neighbor of
333 FREEMAN FERRY RD husb w/Ga. Power
ROME GA 30161

028. JOHNSON BOBBIE JEAN Age 56
5 ROONEY RD
ROME GA 30161

9%

REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
REPORT DATE: 01/21/87 TRAVERSE JURY APRIL 20, 1987
JUDGE: ROBERT G WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.

027. TATE RAY ALLEN
5809 BIG TEXAS VLY RD NW
ROME GA 30161

~~028. NIXON KENNETH LEWIS~~
18 KINGS COURT
ROME GA 30161

Field Wr. State Dept of Labor
031. GRAVES BILLY E
8 MONTRE CIRCLE SE
SILVER CREEK GA 30173

~~032. SACHON JUDY ODELL~~
325 SOUTH McLIN ST.
ROME GA 30161

owns his home
033. COCHRAN JAMES T
6 LINDBERG DRIVE
ROME GA 30161

034. HAWKINS DEENA LOUISE
RT 1 FLOYD SPRINGS RD
ARMUCHEE GA 30105

husb. is mktg. Rep Ga. Power Co.
035. TERRY THELMA B
632 SPOUT SPRINGS RD
ROME GA 30161

036. HOWSE ELIZABETH B
886 HORSELEG CRK RD
ROME GA 30161

Retired owns his home
037. HILL DORSEY B
404 ROBINHOOD RD
ROME GA 30161

Wage 37 office cln. N.W. Ga. Reg. Hosp.
(038) TURNER MARY B owns his home
504 WOODBINE AVE see attached sheet
ROME GA 30161

Dir. Berry College
039. HAULK CHARLES F
109 JOHN ROSS DR
ROME GA 30161

~~(040.) BISHOP BILLY P~~
~~8 GREEN ST~~ see attached sheet
~~ROME~~ GA 30161

(041.) RICHARDSON BEVERLY KAY Dogal? See Attached Sheet
VALLEY ROAD
CAVE SPRINGS GA 30124

~~042. CAMP VICKY R~~
10 KYLE ST
ROME GA 30161

Superd. Inmates At Berry College
043. FUQUA MERRIAM A
820 WARREN RD NE
ROME GA 30161

works for S. Railway
044. HALL DONALD H
79 HALL RD
SILVER CREEK GA 30173

Retired owns his home
045. MCMAHON GEORGE J
2624 LAKERIDGE CIR
ROME GA 30161

Works At Ga. Kraft owns his
046. LEROY CLAIBORNE R
579 OLD ROCKMART RD SE
SILVER CREEK GA 30173

~~047. GARDNER JAMES E JR~~
203 DODD ST
ROME GA 30161

048. HAMMOND SELENA D
3 FRANKLIN ST
ROME GA 30161

~~049. GRAY ROLAND L~~
206 BROOKWOOD AVE
ROME GA 30161

Tech. N.W. Reg Hosp. owns his home
050. HENSON SCOTT R JR
100 CHATILLON ROAD
ROME GA 30161

~~051. HANSON LARRY J~~
23 FANNIN STREET
CAVE SPRINGS GA 30124

052. HOLT ROBIN A
100 DAVIS ROAD SW
CAVE SPRINGS GA 30124

(053.) GREEN GERTRUDE see attached sheet
950 OLD DALTON RD NE
ROME GA 30161

054. GALE ANNA JO
205 1/2 OAKWOOD ST
ROME GA 30161

~~055. GREEN DORIS ANN~~
305 PARK ST
LINDALE GA 30147

056. HOUSE VIRGINIA W
5 DON DR
ROME GA 30161

922

REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
REPORT DATE: 01/21/87 TRAVERSE JURY APRIL 20, 1987
JUDGE: ROBERT D WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.

057. RHINEHART IRALYNE K
Husb. owns Rhinehart Equip. & still owns his home
14 GARDEN CT S
ROME GA 30161

058. ~~SMITH DONALD E~~
317 RIDGEDALE DRIVE
SILVER CREEK GA 30173

059. ~~HOLLINGSWORTH FLORENCE W~~
11 WHEELER STREET
ROME GA 30161

060. ~~BIRDSONG ELIZ D~~
345 BOOZE MTN RD
LINDALE GA 30147

061. ~~CATSCON MARY K~~
4 RIVER ST
CAVE SPRINGS GA 30124

062. LYON JANE K
Dr. Rebecca Bayliss' secretary
Husb. owns Lyon's Den cat. mccall
241 MARGO TR
ROME GA 30161

063. STRAUSS ROBERT JOSEPH
Controller State Mut. Ins. Homeowner
28 MARGO TRAIL
ROME GA 30161

064. ROBERSON ELBERT J
owns Auto collision on Dean St.
9 GREENBRIAR LANE
ROME GA 30161
see attached sheet

065. PHILLIPS BARBARA JEAN
24 BROOKVALLEY COURT
ROME GA 30161

066. WOFFORD FANNIE L
Age 64
142 HASTY RD
ROME GA 30161

067. POWELL SHIRLEY A
Age 25
see attached sheet
E 11TH ST
ROME GA 30161

068. VANN ALVIS
491 LOONEY DR SW
ROME GA 30161

069. HOBAN JOHN W
Driver GA. Hwy. Express Homeowner
12 NOTTINGHAM WAY NE
ROME GA 30161

070. HORNER STEPHEN RAY
GA. Realty Homeowner
117 HYCLIFF RD
ROME GA 30161

071. FINCHER LINDA KAY
14 RED FOX DRIVE
ROME GA 30161

072. HIBBERT MARGARET S
113 HOSEA AVE
ROME GA 30161

073. MILAM ROBERT E
SUMMITT DR
LINDALE GA 30147

074. ~~HUNT ROBERT L~~
21 RIVERVIEW RD
ROME GA 30161

075. ~~RUSSELL INDEE ANN~~
113 DELWOOD DR
ROME GA 30161

076. JACKSON SHIRLEY A
see attached sheet
6 OREBURG RD
ROME GA 30161

077. HIBBERTS KATHY A
Prod. Supv. Berry College
1060 ROSEDALE RD NE
ARMUCHEE GA 30105

078. WATERS VONDA F
Husb. is Lawyer w/Preferred Research
209 OAKWOOD RD
ROME GA 30161

079. HARRISON A STEVEN
100 GRAY ROCK DRIVE
ROME GA 30161

080. ODOM JEFFREY KINSEY
see attached sheet !
47 LAKEVIEW DRIVE SE
LINDALE GA 30147

081. GARRETT C A JR
V P Southern Color Chemical Homeowner
25 MAPLEWOOD SQ
ROME GA 30161

082. FREEMAN E LYNNE
Sch. St. Mary's
48 GLENWOOD APTS
ROME GA 30161

083. BLACKMON ARLENE M
Husb. AOL Homeowner
112 DARK BLVD
ROME GA 30161

084. ~~BEARTON OREN E SR~~
11 CRESTRIDGE DR
ROME GA 30161

92.

REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE
REPORT DATE: 01/21/87 TRAVERSE JURY APRIL 20, 1987
JUDGE: ROBERT G WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.

~~085. HUFF FRANCES C~~
301 CLARKE DR
ROME GA 30161

086. GARRETT MARILYN H
306 EAST 18TH ST
ROME GA 30161

087. MOORE IRMA B
RT 1 CULPEPPER RD
CALHOUN GA 30701

088. DUNCAN MARTHA F
112 PENNCREST DR
ROME GA 30161

089. HOLDER TEDDY R
49 HAMMOND DR SW
ROME GA 30161

090. TAYLOR LUCILE
513 WEST 12TH ST
ROME GA 30161

~~091. SALMON STACY LEIGH~~
18 DEPOT ST NE
ARMUCHEE GA 30105

092. FLOYD MARK EDWIN
5514 BIG TEXAS VLY RD
ROME GA 30161

093. HILL MILDRED S
404 ROBINHOOD RD
ROME GA 30161

~~094. STEGALL SANDRA LEE~~
RT 1 OLD ROCKMART RD
SILVER CREEK GA 30173

095. CAMP MARY BOLT
291 ACRON RD SE
ROME GA 30161

~~096. HUFF ROBERT W JR~~
301 CLARKE DR
ROME GA 30161

097. EARLY CAROLYN J
4 CHRISTOPHER PL
ROME GA 30161

098. BRAND EDGAR SR
114 PERKINS ST
ROME GA 30161

099. HUBBARD HUGH L
71 FRED KELLEY RD
ROME GA 30161

~~100. BOROCHOFF OSCAR~~
311 EAST 9TH ST
ROME GA 30161

101. PLUMMER BETH
1037 OLD RIVER RD SW
ROME GA 30161

~~102. MOORE ORPHA~~
988 BARKER RD SW
ROME GA 30161

103. GODFREY KENNETH LEON
592 GADSDEN RD SW
CAVE SPRINGS GA 30124

104. HYDE PAMELA M
408 SPRING VILLAGE RD
LINDALE GA 30147

105. GRAHAM JESSIE L
31 BLACK BLUFF RD
ROME GA 30161

106. HUFFMAN DON M
792 MELSON RD
CAVE SPRINGS GA 30124

107. HATCH LESLIE R
3 N PENNINGTON AVE
ROME GA 30161

108. HATCH ROY HOMER
217 FLORA AVE
ROME GA 30161

109. GREEN MICHAEL STEVEN
783 JONES MILL RD NE
ROME GA 30161

110. GRINDSTAFF BOBBIE M
47 DOGWOOD ST
ROME GA 30161

111. CADLE NANCY L
146 S AVERY RD SW
ROME GA 30161

~~112. SMITH MARGARET M~~
406 FRED KELLY RD NE
ROME GA 30161

REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE :
REPORT DATE: 01/21/87 TRAVERSE JURY APRIL 20, 1987
JUDGE: ROBERT G WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.

113. BEVELS JAMES H — Wife w/ World Bazaar
499 FRED KELLEY RD NE
ROME GA 30161

114. BERRY VIRGINIA C
87 ANTIOCH RD NW
ROME GA 30161

115. HOWELL WILLIAM JEFFREY — mach. oper. Bekaert Homeowner
25 VIEW DR SE
ROME GA 30161

116. MIXON LEWIS WM — works w/Atlanta Gas Light - Homeowner - wife w/ Ga Power Co.
18 KINGS COURT
ROME GA 30161

117. SUMNERS ROBERT E — Dir. Berry College
43 WESTWOOD CIR
ROME GA 30161

118. FUQUA WALTER S
706 LEE AVE
ROME GA 30161

119. BETHEL MARGARET W — Retired - Homeowner
8 RIDGEWOOD RD
ROME GA 30161

120. WALTERS SHIRLEY Y — Works at Crestwell Nursing Home Homeowner see attached sheet
10 WILLINGHAM ST
ROME GA 30161

121. HARTIS ELIZABETH A — Tel. oper. Horizon Carpets. Homeowner
201 B REECE ST
ROME GA 30161

122. TALIAFERRO ORVIL K — GA. Krall-U.K.
23 FAIRHAVEN DR NW
ROME GA 30161

123. HAGGARD LEONARD — Const. wkr. Union Pipefitters
30 ASH ST
ROME GA 30161

124. STARR NANCY S — Nash - Dealer
3 RIDGEWOOD RD
ROME GA 30161

125. SMITH CAROLYN T — Dir. Berry College see attached sheet
BOX 599
MOUNT BERRY GA 30149

~~126. HOLCOMBE ODESSIA MOORE~~
32 GLENVIEW DR NE
ROME GA 30161

127. EVANS ADELE A
311 EAST 2ND AVE
ROME GA 30161

128. COX CHARLES P — Retired Homeowner
611 CEDAR AVE
ROME GA 30161

129. OTWELL WM CRAIG JR — see attached sheet
758 HOLLAND RD NW
ROME GA 30161

~~130. WOODALL LILLIE O~~
109 HEMLOCK ST
ROME GA 30161

131. [illegible] — Nash works for Walker Management Co. Homeowner
521 Riley Eagle Rd

132. [illegible] — Nash works for Sears Homeowner
[illegible]

133. [illegible] — Dir. Brandon Sec. Sta.
302 [illegible]

134. [illegible] — V.P. Blanton Plow see attached sheet
35 Black Bluff Rd

135. [illegible]
51 [illegible]

[illegible] — see attached sheet

137. [illegible] — Nash works for Rich's after Sears
[illegible]

925

138. HAIGWOOD, DIANNE M. Home owner - works at Redwood Park Inn
13 John's Drive. N.E.

139. GUY C. GRIFFIN
382 Collier Rd. NE.

140. POOLE, Barbara Ann
656 Abrams Rd.
Silver Creek, Ga.

141. HITT, Reid works for Valley Vend
Home owner
241 Cave Spring St.
Rome

142. NORTON, Helen G. Retired - Homeowner
514 Cooper Dr.

143. BOOKER, James H., Jr. Assoc/w Lanier, Hallman, Robertson Ins (Hallman's Son-In-Law)
Home owner
511 E. 9th St.

144. WALKER, Ruby
2 Walker Dr.
Rome, Ga.

145. Chambers, Carol L. works at Belk's
3108 Kingston Hwy. S.E.
Rome, Ga.

146. FREEMAN, Christopher E.
21 Highland Blvd. N.W.
Rome

147. MONTGOMERY, Idalee D. See At Buying Mach.
49 Haywood Valley Rd. N.W.
Armuchee, Ga.

148. CROUCH, Barbara Husb is Ins Agent - Homeowner
103 Rolling Oaks Dr.

149. GILBREATH, Steven G. mach oper. Pepperell Mfg.
1021 Booze Mtn. Rd.
Lindale,

150. SAUNDERS, Claude H.
504 E. 10th St.
Rome

151. LITTLEJOHN, Myra Jane B.
Atteriam Heights
Rome

152. LOYD, James Wm. Truck driver for Int Baking
3121 Choun Hwy.

153. GARNER, Lynn Former sheriff of Floyd C.
7 E. 19th St.

154. HOLLIFIELD, Inez Works at Grandma's Kitchen
Shuppe Homemaker
517 Elliot Dr.

155. TREADAWAY, Noel O. Crane op. - GA Kraft Inc
600 Billy Pyle Rd.

926

156. FOSS, Elizabeth H. Homemaker
1388 Old Summerville Rd. N.W.
.....Rome,.Ga.....

157. HOLDEN, Barbara Ret. Homemaker
206 E. Valley Rd.
.....Rome,.Ga.....

158. FLOWERS, Juanita
.....133.Jim.Lee.Dr.....

159. BRIERLY, Raymond A
.....399.Warren.Rd..N.E.....

160. COOK, Opal ret. - Homemaker
.....107.Burnett.Perry.Rd.....

161. BREEDEN, J.D. See attached sheet
.....282.McGrady.Rd.....

162. DEMPSEY, Dallas Homemaker
.....505.E.11th.Street.....

163. GRESHAM, Louise
.....797.Turner.Chapel.Rd...S.E.....

164. BOHANNON, Sherry
.....7.Battey.Dr.....

165. WILLIAMS, Pauline ret. Homemaker
.....107.Woodcrest.Drive.....

166. DEAN, Peggy
.....208.Stonewall.St. See attached sheet

167. PERRY, Ralph ret. - Homemaker
104 W. Lakeshore
.....

168. CROWE, Clayton
.....8.Maplewood.Sq.....

169. SHARP, Selma
Box 90
.....Boyd.Valley.Rd.....

170. HIGHTOWER, Delorres C.
.....929.Moran.Lake.Rd.....

171. McELWEE, Gary John
.....2120.Calboun.Rd.,N.E.....

172. WEST, Vera
.....5.Ridge.Dr.....

173. HALE, Roberta
.....928.Turner.Chapel.Rd.....

174. LEITHAUSER, Peggy
.....100.Saddle.Mt..Rd See attached sheet

175. GOBLE, Rebecca Elaine
.....3.Wood.Valley.Rd.....

176. WAKEFIELD, George E.
.....33.Doncaster.Dr.....

177. YOUNG, Betty R.
.....17.Dooley.Dr.. See attached sheet

SHEFFIELD, Jean B.
802 Dogwood Lane

927

APRIL 20, 1987 - CONTINUED JURY LIST

179. STUART, Kelly F. Keith A. angle. Lee A. Andrew - Homemaker
✓ 105 4th Street
.....Shannon,.GA..30172.....

928

PLEASE PROVIDE VERIFICATION ON THE NAME, ADDRESS, RACE, SEX AND AGE OF THE FOLLWING PERSONS:

(1)
Neal Barry Dempsey
3 Primulus Dr
Rome, GA 30161
W M (21 yrs) D/B 5/5/65

(2)
Bonnie Harper
129 Barron Road, NE
Rome, GA
W F (68) D/B 3/27/19

(3)
Sarah H. Lanier
711 Lee Ave
Rome, GA
w f (31) d/b 5/1/55

(4)
Wiley Kelvin Ratliff
4915 Calhoun RD NE
Rome, GA
W M (24) D/B 3/12/63

(5)
Mary A. Hackett
3 Mitchell Circle
Rome, GA
w f (30) d/b 9/24/56

(6) OFF
Kip Alan Wm Cecil
52 Pineridge DR
Rome, GA
w m (29) d/b 3/16/58

(7)
Mary Ellen Beyseigel
4 Northwood Drive
Rome, GA
w f (53) d/b 7/15/33

(8)
Rickey J. Cagle
3651 Cave Spring RD
Rome, GA
w m (33) d/b 7-6-53

(9)
Eddie Hood
13 Copeland St.
Rome, GA
b m (46) d/b 5/26/40

(10)
Joyce M. Nicholson
5 Conway Pl.
Rome, GA
w f (35) d/b 12/1/51

(11)
Nora Adline McGinnis
7 McGinnis Dr , SE
Rome, GA
w f (70) d/b 1-8-17

(12) OFF
J. Terry Clements
201 Turner Chapel Rd.
Rome, GA
w m (30) d/b 8-2-56

(13)
Margaret D. Hoelzer
907 E. 2nd Ave.
Rome, GA
w f (65) d/b 10-17-21

(14)
Mary H. Stansell
1928 Little Texas Valley Rd., NW
Rome, GA
w f (53) d/b 1/8/34

(15)
Louise Wilson
1603 Flannery St.
Rome, GA
b f (67) d/b 11/4/19

(16)
Maureen B. Barbogello
207 Ausburn Rd.
Rome, GA
w f (54) d/b 8/20/32

(17)
Anna W. Carr
31 Maplewood Sq
Rome, GA
w f (67) d/b 5/28/19

(18)
Patricia A. Bing
5452 Fosters Mill Rd., SW
Cave Spring, GA
w f (38) d/b 2-18-49

(19)
Corrie Lee Hines
121 Chambers St.
Rome, GA
b m (65) d/b 1/1/22

(20)
Myrtle Frances Evans
186 Turkey Mountain Rd.
Armuchee, GA
w f (44) d/b 5/14/42

(21)
Dorothy M. Black
5117 Alabama Rd., SW
Rome, GA
w f (65) d/b 8/29/21

(22)
Evelyn Hardge
334 West Ross St.
Rome, GA
b f (68) d/b 12/8/18

929

B. Coultas (23)
Olds Bell Ferry Rd
ome, GA
w f (36) d/b 1-12-51

Victor Deduerwaerder (25)
28 Wingfield St
Rome, GA
w m (67) d/b/ 5/14/19

Charlotte S. House (27)
333 Freeman Ferry Rd
Rome, GA 9-20-37
w f (49) d/b/ 9-2-37

Ray Allen Tate (29)
5809 Big Texas Valley Rd
Rome, GA
w m (48) d/b/ 7-12-38

Billy E. Graves (31)
8 Montre Circle
Silver Creek, GA 1-19-34
w m (53) d/b 1-17-34

James T. Cochran (33)
6 Lindbery Drive
Rome, GA
w m (57) 7/7/29

Thelma B. Terry (35)
632 Spout Springs Rd
Rome, GA
w f (38) d/b 3/4/49

Dorsey B. Hill (37)
404 Robinhood Rd
Rome, GA
w m (69) d/b 6-25-17

Charles F. Haulk (39)
109 John Ross Drive
Rome, GA
w m (48) d/b 8/22/38

Beverly Kay Richardson (41)
Valley Road
Cave Spring, GA
w f (27) d/b 8/28/59

Merriam A. Fuqua (43)
820 Warren Rd NE
Rome, GA
w f (57) d/b 12/19/29

George J. McMahn (45)
2624 Lakeridge Circle
Rome, GA
w m (71) d/b 5/17/15

Lou Ella Hobgood (24)
28 Pine Valley Rd
Rome, GA
w f (29) d/b 11-13-57

State v Foster 86-F-2218-2
33/103

Ruby Barnes Stanely (26)
296 Painter Rd
Rome, GA
w f (64) d/b 11-13-22

Bobbie Jean Johnson (28)
5 Rouney Rd
Rome, GA
b f (55) d/b/ 11/29/31

Kenneth Lewis Mixon (30)
18 King Court
Rome, GA
w m (25) d/b/ 7-4-61

Jody Odell Salmon (32)
325 South McLin St.
Rome, GA
w m (24) d/b 4/14/63

Deena Louise Hawkins (34)
Rt. 1, Floyd Springs RD
Armuchee, GA
w f (22) d/b 10-3-64

Elizabeth B. Howse (36)
886 Horseleg Creek Rd
Rome, GA
w f (34) d/b 8/30/52

Mary B. Turner (38)
504 Woodbine
Rome, GA
b f (37) d/b 1/6/60

Billy P. Bishop (40)
8 Green Street
Rome, GA
w m (48) d/b 5/26/38

Vicky K. Camp (42)
10 Kyle St
Rome, GA
w f (33) d/b 10/17/53

Donald H. Hall (44)
79 Hall Rd
Rome, GA
w m (54) d/b 8/11/32

Clairborne R. Leroy (46)
579 Old Rockmart Rd SE
Silver Creek, GA
w m (55) d/b 3/22/32

930

,s C. Gardner, Jr (47)
Dodd Street
,ome, GA
, m (60) d/b 6/28/26

(49) off
Holand L. Gray 4/02/20
106 Brookwood
, m (67) d/b 4/20/20

,arry . Hanson (51)
13 Fannin Street
Cave Spring, GA
, m (34) d/b 3/8/53

Gertude Green (53)
950 Old Dalton Rd NE
Rome, GA
, f (69) d/b 12/3/17

Doris Ann Green (55)
305 Park St
Lindale, GA
, f (51) d/b 6/26/35

Coralyne K. Rhinehart (57)
14 Garden Court S
Rome, GA
, f (67) d/b 7/5/19

Florence W. Hollingsworth (59)
11 Wheeler St
Rome, GA
w f (73) d/b 11/7/14

Mary K. Grisson (61) off
4 River St
Cave Spring
w f (79) 12/10/07

Robert Joseph Strauss (63)
28 Margo Trail
Rome
w m (40) d/b 12/17/46

Barbara Jean Phillips (65)
24 Brook Valley Ct
Rome, GA
w f (22) d/b 4/24/64

Shirley A. Powell (67)
E 11th
Rome
b f (25) d/b 4/1/62

Selena D. Hammond (48) Stated Foster 86-F-2218-2
3 Franklin Street (Big Tex Valley Rd) 34/103
Rome, GA
w f (26) d/b 7/19/60

Scott R. Henson, Jr. (50)
100 Chatillon Rd (100 Westmore Rd)
w m (28) d/b 6-17-58

Robin A. Holt (52)
100 Davis Road (20 Norwood)
Cave Spring, GA
w f (28) d/b 12/27/58

Anna Jo Gale (54)
205-1/2 Oakwood St
Rome, GA
w f (59) d/b 10/19/27

Virginia W. Howse (56)
5 Don Drive
Rome, GA
w f (66) d/b 1/18/21

Donald E. Smith (58) off
317 Ridgedlae Dr
Silver Crk, GA
w m (56) d/b 9/25/30

Elizabeth D. Birdsong (60) off
345 Booze Mtn Rd
Lindale, GA
w f (28) d/b 8/11/58

Jane K. Lyon (62)
241 Margo Trail
Rome
w f (55) 7/4/31

Elbert J. Roberson (64)
9 Greenbriar Lane
Rome
w m (53) d/b 8/5/33

Fannie L. Wofford (66)
142 Hasty Rd
Rome
b f (64) d/b 3/7/23

Vann Alvis (68)
491 Looney Dr SW
Rome
w f (74) d/b 3/11/13

931

(69)
, W. Hoban
Nottingham Way NE
ome,
w m (62) d/b 2/1/25

(70)
Stephen Ray Horner
117 Hycliff Rd
Rome
w m (32) d/b 6/30/54

(71)
Linda Kay Fincher
14 Red Fox Dr
Rome
w f (34) 6/24/52

(72)
Margaret S. Hibbert
113 Hosea Dr
Rome
w f (44) d/b 8/25/42

(73)
Robert E. Milam
Summitt Dr
Lindale
w m (50) d/b 11/22/36

(74)
Robert L. Hunt
21 Riverview Dr
Rome
w m (20) d/b 10/5/66

(75)
Indee Ann Russell
113 Delwood Dr.
Rome, GA
w f (20) d/b 4/19/67

(76)
Shirley A. Jackson
6 Oreberg Dr
Rome, GA
w f (52) d/b 12/29/34

(77)
Kathy A. Hibberts
1060 Rosedale Rd NE
Armuchee
w f (32) d/b 6/25/54

(78)
Vonda L. Waters
209 Oakwood Rd
Rome
w f (26) d/b 4/24/50

(79)
A. Steven Harrison
100 Gray Rock Dr.
Rome
w f (31) d/b 7/22/55

(80)
Jeffrey Kinsey Odom
47 LAkeview Dr SE
Lindale
w m (23) 8/9/63

(81)
C. A. Garrett, Jr.
25 Maplewood Sq.
Rome
w m (40) d/b 11/14/46

(82)
E. Lynne Freeman
48 Glenwood Apt
Rome
w f (28) 7/12/58

(83)
Arlene M. Blackman
1122 Park Blvd
Rome
w f (47) d/b/ 6/4/39

(84)
Owen L. Blanton, Jr.
11 Crestridge Dr
Rome
w m (57) d/b 8/4/29
OFF

(85)
Frances C. Huff
301 Clarke Dr
Rome,
w f (27) d/b 6/17/59

(86)
Marilyn H. Garrett
306 E 18 St
Rome
b f (34) d/b 6/23/52

(87)
Irma B. Moore
Rt 1, Culpepper Rd
Calhoun
w f (65) d/b 6/12/21

(88)
Martha F. Duncan
112 Penncrest Dr
Rome
w f (43) d/b 10/19/43

(89)
Teddy R. Holder
49 Hammond Dr, SW
Rome
w m (35) d/b 10/5/51

(90)
Lucile Taylor
513 W 12th St
Rome
b f (72) d/b 10/1/14

932

(91)
:y Leigh Salmon
. Depot St NE
rmuchee
f (24) d/b 10/3/62

(92)
Mark Edwin Floyd
5514 Big Texas Valley Rd
Rome
w m (21) d/b 3/22/66

(93)
ildred S. Hill
04 Robinhood Rd
ome
f (55) d/b/ 9/17/21

(94)
Sandra Lee Stegall
Rt 1, Old Rockmart Rd
Silver Crk
w f (20) d/b 7/13/66

(95)
ary Bolt Camp
91 Arcon Rd SE
ome, GA
f (73) d/b 12/19/13

(96)
Robert W. Huff, Jr
301 Clarke Dr
Rome, GA
w m (34) d/b 7/26/52

(97)
arolyn J. Early
Christopher Place
ome
f (55) d/b 12/22/31

(98)
Edgar Brand, Sr
114 Perkins St
Rome
b m (51) d/b 1/2/26

(99)
ugh L. Hubbard
1 Fred Kelley Rd
ome
m (55) d/b 9/30/31

(100)
Oscar Borochoff
311 E 9th St
Rome
w m (84) d/b 8/5/02

(101)
eth B. Plummer
037 Old River Rd SW
ome
f (51) 11/10/35

(102)
Orpha Moore
988 Barker Rd SW
Rome
w f (67) d/b 6/6/19

(103)
enneth Leon Godfrey
92 Gadsen Rd SW
ave Spring
m (57) d/b 8/18/29

(104)
Pamela M. Hyde
408 Spring Village Rd
Lindale
w f (41) d/b 9/29/45

(105)
essie L. Graham
1 Black Bluff Rd
ome
f (74) d/b/ 10/9 12

106
Don M. Huffman
792 Melson Rd
Cave Spring
w m (21) d/b 3/30/66

(107)
eslie R. Hatch
North Pennington Dr
ome
m (44) d/b 10/13/42

1/01/20 108
Roy Homer Hatch
217 Flora Ave
Rome
w m (67) d/b 1/10/20

(109)
ichael Steven Green
83 Janes Mill Rd NE
ome
m (25) d/b 3/28/62

(110)
Bobbie M. Grindstaff
47 Dogwood St
Rome
w f (47) d/b 2/21/30

(111)
ancy L. Cadle
46 S. Avery Rd SW
ome
f (47) d/b 8/16/39

(112)
Margaret K. Smith
406 Fred Kelly Rd NE
Rome
w f (37) d/b 3/5/50

933

(Roger Dale)

(113)
...s H. Bevels
...g Fred Kelley Rd NE
...ome
w m (37) d/b 2/8/50

(115)
William Jeffrey Howell
25 View Drive SE
Rome
w m (31) d/b/ 5/25/55

(117)
Robert E. Sumners
43 Westwood Circle
Rome
w m (56) d/b 4/10/31

(119)
Margaret W. Bethel
8 Ridgewood Rd
Rome
w f (77) d/b 11/11/09

(121)
Elizabeth A. Hartis
201 B. Reece St(10B Rosemary Ct)
Rome
w f (36) d/b 2/28/51

(123)
Leonard Haggard
30 Ash St
Rome
w m (60) d/b 9/9/26

(125)
Carolyn T. Smith
Box 599 (Mount Berry)
Rome
w f (55) d/b 5/8/31

(127)
Adele A. Evans
311 E. 2nd Ave
Rome
w f (66) d/b 11/20/20

(129)
Willaim Craig Otwell, Jr.
758 Holland NW
Rome
w m (29) d/b 9/20/57

(131)
Wanda D. Watkins
521 Billy Pyle Rd
Rome
w f (30) d/b 2/8/57

(133)
A. D. Branton
302 Randall Rd SW
Cave Spring
w m (71) d/b 12/11/15

(114)
Virgina G. Berry
87 Antioch Rd NW
Rome
w f (36) d/b 1/8/51

1/3/57

(116)
Lewis William Mixon
18 Kings Coury
Rome
w m (51) d/b 9/27/35

(118)
Walter S. Fuqua
706 Lee Ave (1804 Gordon Ave)
Rome
w m (38) d/b 1/20/49

(120)
Shirley Y. Walters
10 Willingham St
Rome
w f (43) d/b 10/10/43

(122)
Orvil K. Taliaferro
23 Fairhaven Dr NW
Rome
w m (56) d/b 2/25/31

(124)
Nancy S. Starr
3 Ridgewood Rd
Rome
w f (62) d/b/ 5/22/24

(126)
Odessa Moore Holcombe
32 Glenview Dr NE
Rome
w f (65) d/b 9/23/21

OFF

(128)
Charles P. Cox
611 Cedar Ave
Rome
w m (67) d/b 1/15/20

(130)
Lillie C. Woodall
109 Hemlock St
Rome
w f (76) d/b 1/21/11

OFF

(132)
Louise Honaker
6 Garden Court S
Rome
w f (65) d/b 5/1/21

(134)
Louise D. Bagley
35 Blacks Bluff Rd
Rome
w f (-) no birthdate

934

(135) white male
ay Shedd (Eugene)
D Wilkins St or
691 Huffacre Rd
Rome
w f (21) d/b/ 10/11/65

(136)
Darlene Graham
R 6, Hasty Rod
Rome
b f (28) d/b 6/25/58

(137)
Jo Ann Parker
459 Old Rosedale Road (Armuchee)
401 N. 5th Ave
Rome
w f (55) d/b/ 1/6/32

(138)
Dianne M Haigwood
13 Johns Drive NE
Rome
w f (40) d/b 5/27/46

(139)
Guy C. Griffin
382 Collier Rd NE
Rome
w m (76) d/b 11/11/10

(140)
Barbara Ann Poole
656 Abrams Rd SE
Silver Creek
w f (43) d/b 4/6/44

(141)
Reid Hitt
241 Cave Spring St
Rome
w m (64) d/b/ 11/6/22

(142)
Helen G. Norton
514 Cooper Dr
Rome
w f (71) d/b 1/11/16

(143)
James H. Booker, Jr
511 E 9th St
Rome
w m (37) d/b 1/26/50

(144)
Ruby Walker
2 Walker Dr
Rome
w f (65) d/b 1/11/22

(145)
Carol L. Chambers
3108 Kingston Hwy SE
Rome
w f (21) d/b 1/11/66

146
Christopher E. Freeman
21 Highland Blvd NW
Rome
w m (21) d/b 9/3/65

148
Barbara H Couch
103 Rolling Oaks Drive
Rome
w f (55) d/b 1/20/32

(147)
Idalee Montgomery
49 Haywood Valley Rd NW
Armuchee
w f (48) d/b 3/30/39

(149)
Steven G. Gilbreath
1121 Booze Mt Rd
Lindale
w m (39) d/b 8/7/47

(150)
Claud H. Sanders
504 E 10th St
Rome
w m (40) d/b 12/10/46

(151)
Myra Jane Littlejohn
Atteriam Heights
(formerly Myra Jane Bice)
501 Calhoun Ave
w f (41) d/b 830/45

(152)
James William Loyd
3121 Calhoun Hwy
Rome
w m (42) d/b 7/23/44

(153)
Lynn Garner
7 E 10th
Rome
w m (64) d/b 9/18/22

(154)
Inez P. Hollifield
517 Elliott Drive
Rome
w f (66) d/b 4/28/20

(155)
Noel Treadway
600 Billy Rd
Rome
w m (52) d/b 5/9/34

(156)
Elizabeth H Foss
1388 Old Summerville Rd NW
Rome
w f (43) d/b 7/12/43

935

oara Holden (157)
,6 E. Valley Rd
Rome,
w f (64) d/b 10/21/22

Raymond A Brierley (159)
399 Warren Rd NE
Rome
w m (44) d/b 7/21/42

J. D. Breeden (161)
282 McGrady Rd
Rome
w m (66) d/b 5/13/20

Louise Gresham (163)
797 Turner Chapel Rd SE
Rome
w f (57) d/b 4/18/30

Pauline Williams (165)
107 Woodcrest Dr
Rome
w f (76) d/b 9/13/10

Ralph Perry (167)
104 West Lakeshore Dr
Rome
w m (60) d/b 8/2/26

Selma Sharpe (169)
90 Boyd Valley Rd
Rome
w f (66) d/b 4/22/20

Gary John McElwee (171)
2120 Calhoun Rd NE
Rome
w m (23) d/b 7/25/63

Roberta Hale (173)
928 Turner Chapel Rd
Rome
w f (63) d/b 12/11/23

Rebecca Elaine Goble (175)
3 Wood Valley Dr
Rome
w f (36) d/b 6/8/50

Betty Roe Young 179
17 Donley Dr
Rome
w f (35) d/b/ 4/26/51

Kelly F. Stuart 189
105 4th St
Shannon
w m (23) d/b 6/3/63

Juanita Flowers (158)
133 Jim Lee Dr
Rome
w f (57) d/b 7/11/29

Opal Cook (160)
107 Burnette Ferry Rd
Rome
w f (65) d/b 10/21/21

Dallas Dempsey (162)
505 E 11th St
Rome
w m (64) d/b 8/27/22

Sherry Bohanon (164)
7 Battey Dr
Rome
w f (48) d/b/ 12/15/38

Peggy Dean (166)
208 Stonewall
Rome
b f (40) d/b 4/24/46

Clayton Crowe (168)
8 Maplewood Sq
Rome
w m (60) d/b 9/8/26

Delores C. Hightower (170)
929 Moran Lake Rd
Rome
w f (46) 11/10/46

Vera West (172)
5 Ridge Dr
Rome
w f (66) d/b 1/1/21

Peggy Leithauser (174)
100 Saddle Mt Rd
Rome
w f (47) d/b 7/18/39

George E. Wakefield (176)
35 Doncaster Dr
Rome
w m (35) d/b 3/30/52

Jean B Sheffield (178)
402 Dewberry Lane
Lindale
w f (29) d/b 12/11/57

936

1 [redacted]

2. BONNIE HARPER

[redacted]

4. WILEY KELVIN RATLIFF

5 5. MARY A. HACKETT N

[redacted]

7 9. EDDIE HOOD N

8 10. JOYCE M. NICHOLSON

[redacted]

[redacted]

[redacted]

[redacted]

13 18. PATRICIA A. BING

[redacted]

15 20. MYRTLE FRANCES EVANS

[redacted]

17 22. EVELYN HARDGE N

18 23. ANNE B. COULTAS

19 24. LOU ELLA HOBGOOD N

20 25. VICTOR DEDEURWAERDER

[redacted]

[redacted]

22 29. RAY ALLEN TATE

23 31. BILLY E. GRAVES

24 33. JAMES T. COCHRAN

[redacted]

25 [redacted]

26 [redacted]

27 37. DORSEY B. HILL

28 38. MARY B. TURNER N

29 39. CHARLES F. HAULX

30 [redacted]

31 41. [redacted]

32 [redacted]

33 44. DONALD E. HALL

34 45. GEORGE J. McMAHON

35 46. CLAIBORNE R. LEROY

36 48. SELENA D. HAMMOND

37 [redacted]

38 [redacted]

39 [redacted]

40 54. ANNA JO GALE N

[redacted]

41 [redacted]

42 [redacted]

[redacted]

64. ELBERT J. ROBERSON

Jury Selection

[redacted]

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TRAVERSE JURORS for the Week of APRIL 20, 1987: State

State v Foster 86-P-2218-2
41/103

1 [redacted]

2 2. BONNIE HARPER D

3 [redacted]

4 4. WILEY KELVIN RATLIFF

5 5 N MARY A. HACKETT N

6 [redacted]

7 9 N EDDIE HOOD N

8 10. JOYCE M. NICHOLSON

9 [redacted]

10 [redacted]

11 [redacted]

12 [redacted]

13 18. PATRICIA A. BING

14 [redacted]

15 20. MYRTLE FRANCES EVANS

16 [redacted]

17 22. N EVELYN HARDGE N

18 23. ANNE B. COULTAS

19 24 LOU ELLA HOBGOOD N

20 25. VICTOR DEDEURWAERDER

21 [redacted]

22 29. RAY ALLEN TATE

23 31. BILLY E. GRAVES

24 33. JAMES T. COCHRAN

25 [redacted]

26 [redacted]

27 37. DORSEY B. HILL

28 38 N MARY B. TURNER N

29 39. CHARLES F. HAULK

30 [redacted]

31 41. [redacted]

32 [redacted]

33 44. DONALD H. HALL

34 45. N GEORGE J. McMAHON N

35 46. CLAIBORNE R. LEROY

36 48. SELENA D. HAMMOND

37 [redacted]

38 [redacted]

39 [redacted]

40 54 N ANNA JO GALE N

[redacted]

41 [redacted]

42 [redacted]

[redacted]

64. ELBERT J. ROBERSON

- Jury Selection -

[redacted]

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TRAVERSE JURORS for the Week of APRIL 20, 1987:

[redacted]

47. N SHIRLEY A. POWELL N

49 49. JOHN W. HOBAN

50 50. STEPHEN RAY HORNER

51 51. LINDA KAY FINCHER

52 52. MARGARET S. HIBBERT

53 53. ROBERT E. MILAM

54 54. SHIRLEY A. JACKSON

[redacted]

56 [redacted]

57 57. [redacted]

58 58. [redacted]

59 59. C. A. GARRETT, JR.

[redacted]

61 83. ARLENE M. BLACKMON

62 84. N MARILYN H. GARRETT N

[redacted]

64 90. MARTHA P. DUNCAN

[redacted]

[redacted]

66 92. MARK EDWIN FLOYD

67 93. MILDRED S. HILL D

[redacted]

68 [redacted]

69 97. HUGH L. HUBBARD D

70 98. BETH B. PLUMMER

[redacted]

72 100. PAMELA M. HYDE

[redacted]

74 105. DON M. HUFFMAN

75 107. LESLIE R. HATCH

76 108. ROY HOMER HATCH

[redacted]

78 110. N BOBBIE M. GRINDSTAFF N

79 111. NANCY L. GADLE

80 112. JAMES H. BEVELS

81 113. VIRGINIA G. BERRY

82 114. WILLIAM JEFFREY HOWELL

83 115. LEWIS WM. MIXON

84 116. ROBERT E. SUMMERS

85 117. WALTER S. FOQUA

86 118. MARGARET W. BETHEL

87 120. SHIRLEY Y. WALTERS

88 120. ELIZABETH A. HARTIS

89 121. ORVIL R. TALIAFERRO

939

TRAVERSE JURORS for the Week of [redacted]RIL 20, 1987:

46. [redacted]S

47. [redacted]

48. SHIRLEY A. POWELL N

49. JOHN W. HOBAN

50. STEPHEN RAY HORNER

51. LINDA KAY FINCHER

52. MARGARET S. HIBBERT

53. ROBERT E. MILAM

54. SHIRLEY A. JACKSON

55. [redacted]S

56. [redacted]

57. [redacted]

58. [redacted]

59. C. A. GARRETT, JR.

[redacted]

61. ARLENE M. BLACKMON

62. MARILYN H. GARRETT N

63. [redacted]

64. MARTHA P. DUNCAN

65. [redacted]

[redacted]

67. MARK EDWIN FLOYD

68. MILDRED S. HILL D

64. [redacted]

68. [redacted]

69. HUGH L. HUBBARD D

70. BETH B. PLUMMER

71. [redacted]

72. PAMELA M. HYDE

[redacted]

74. DON M. HUFFMAN

75. LESLIE R. HATCH

76. ROY HOMER HATCH

77. [redacted]

78. BOBBIE M. GRINDSTAFF N

79. NANCY L. CADLE

80. JAMES H. BEVELS

81. VIRGINIA G. BERRY

82. WILLIAM JEFFREY HOWELL

83. LEWIS WM. MIXON

84. ROBERT E. SUMNERS

85. WALTER S. FUQUA

86. MARGARET W. BETHEL

87. SHIRLEY Y. WALTERS

88. ELIZABETH A. HARTIS

89. ORVIL K. TALIAFERRO

Voir Dire
~~Foster~~

1) Cover questionaire. Photographs

2) Relationship to Δ
Parents
Sister

3) Relationship to Counsel - ~~Appointed~~
Mr. Farrell
Mr. Platt

4) You, any member of family or close friend seen + treated by the ~~Defendant~~ psychiatrist - Dr. Douglas K. Lajoie LIPEL Wrongful Commitment
or Dr. Frank Platt

5) Would you apply the tests of common sense and reason to all the testimony in this case including experts.

6) Can you decide this case based on the facts + ~~not at all on fairness, appearance) or sympathy?~~

7) The defense in this case has served notice that the defense might be insanity. Have you had any personal experience with insanity or mental illness that would affect your ability to be a fair and impartial juror?

8) Do you have any training (or education) in either psychology or history?

photographs + accounts of the crime are horrible & that affect your ability to be a juror?

941

9.) Primary source of news? V

10.) Believe everything you read in papers or see on T.

12) Know V.

13) We want a fair & impartial jury who can base its verdict solely on evidence presented in courtroom. Can you put aside news accounts and base your verdict solely on the evidence presented in the courtroom?

14) Discuss case w/ anyone who claimed to have knowledge of the facts

15.) Put out of mind & base solely on evid presented in courtroom.

1. Louise Wilson
1603 Flannery St. Age 68
↗ Husband
Lives In East Rome Area. (Pr. Black)
Goes to ~~Great Advent Bpt Church~~ Met. Married
House is ~~with~~ 17 ~~[illegible]~~ Very neat older Lady
~~[illegible]~~ Brown Car (~~[illegible]~~ Calling
Ford

2. Shirley Powell - Young Lady
(Crazy)
Take Warrant out on G. Plmt who's work
at Library. Also G. Plmt has take warrant
out on her. (I Believe she would not Be
a very good person.

3. Marilyn Garrett -
306 E 18th Street.

Live In A Apt. on 18th Street Drives a Brown
Sub. A Cousin of Angela Garrett She
was Rise in the Cooper Area. Very
Low Income

4. Edgar Brand (Crazy) 30 older
114 Peek In St. Real mean

Live at home with parent. Has gone
to Calf with no money.

5. Cortez Hines - (Very Neat House)
121 Chamber
Be Careful of this person.
Son was put on Prob For 12 month (Forg.)

943

Evelyn Hardge
334 West Ross St.

Live In North Rome, Goes to St. Paul AME Church. Might be the Best one to put on Jury. Husband is very sick man of he's still Live. (House worth 17,500)

for Mary B Turner (Belinda)
504 Woodbine

She Think that she Claim Ye sister.

Married to [redacted] Perry Turner

944

B#1

Eddie Hood

N

hesitated - when asked about DP

(yes) " " . " auto voting for life imprisonment

unsure of use of word automatically -

psychiatric question - "never had it" didn't answer question!

discussion w/ co-workers about him trying to escape

ex son - 18yrs old

work Demands / didn't ask a lot of questions

[redacted]

didn't read deathpenalty

945

B#2 – Batson issue

#15 Lora Wilson

have heard facts are radio – when asked formed or expressed any opinion

hesitated when answ? prejudice or bias

I don't believe in capital punishment

I don't know – when asked learn the way.

I don't know-

I'm afraid

learn more

yes

excused excused for cause

946

B#3

Carrie Hines

answered affirmatively to Question # 41

Age - 64 yrs

Segregation - Hardship Question # 42

Excused for cause

prosecutor is entitled to exercise permitted peremptory challenge for any reason at all - as long as that reason is related to his view of the outcome'

Batson - D is not entitled to a jury composed in whole or in part of persons of his race

Neutral explanation for challenging black

- explanation need not rise to level of challenge for cause
- prosecutor is not compelled to justify use of peremptory challenges against members not of the D race -

however - when I strike a jury I look primarily at male/female combination and past experience

① generally - women appear to be sympathetic to person in D.P. case

② men appear to be more D.P. advocates

Consequently - usually strike more women than men

③ in the 41 cases that were reversed for Cage/apprendi
29 women 12 men - 70% were women who were struck

④ in the ten death penalty reversals - 8 women 2 men - 80%

The following trend that women are reversed more than men - especially in my selection of a jury in light of 10 reversals selecting juries

- 10 strikes - 8 women 2 men

- in a case of this nature - if I select women, they should be older - preferably living alone or retired, stable background, long term community ties

948

JURORS

Juror #				
D02		Bonnie Harper		WF
D04		Wiley K. Radcliff		WM
D05	N	Mary Hackett	N	WF
D09	N	Eddie Hood	N	BM
D10		Joyce Nicholson		WF
D18		Patricia Bing		WF
D20		Myrtle Evans		WF
D22	N	Evelyn Hardge	N	BF
D23		Ann Coultas		WF
D24	N	LoElla Hobgood	N	WF
D25		Victor DeDeurwaerder		WM
D29		Ray Allen Tate		WM
D31		Billy Graves		WM
D33		James T Cochran		WM
D37		Dorsey Hill		WM
D38	N	Mary Turner	N	BF
D39		Charles Haulk		WM
D44		Donald H. Hall		WM
D45	N	George McMahon	N	WM
D46		Claiborne Leroy		WM
D48		Salena Hammond		WF
D54	N	Anne Jo Gale	N	WF
D64		Elbert Roberson		WM
D67	N	Shirley Powell	N	BF
D69		John Hoban		WM
D70		Stephen Horner		WM
D71		Linda Kay Fincke		WF
D72		Margaret Hibbard		WF
D73		Robert Milam		WM
D76		Shirley Jackson		WF
D81		C.A. Garrett		WM
D83		Arlene Blackmon		WF

949

086	N	Marilyn H. Garrett	N	BF
088		Martha Duncan		WF
092		MARK FLOYD		WM
093		Mildred Hill		WF
099		Hugh Hubbard		WM
104		Pamela Hyde		WF
106		Don Huffman		WM
107		Les Hatch		WM
108		Roy Hatch		WM
109	N	Bobbie Grindstaff	N	WF

ALTERNATES

011		Nancy Cadle	WF
013		James Bevels	WM
114		Virginia Berry	WF
115	N	Wm. Jeff Howell	N WM
117		Robert Sumner	WM
118		Walter S. Fuqua	WM
121	N	Elizabeth Harris	N WF
122		Orvil Taliaferro	WM

ADD ONS

125 Carolyn Smith
133 A.D. Branton

950

Definite NO's

① Hood

② HARDGE never

③ Powell

④ Garrett

⑤ Turner

⑥ Grandstaff

Questionables

N ① Hobgood

N ⑤ McMahon

N ③ Gale

④ Hatch

⑥ ~~Howell~~

Alternates

① Bevels

② Howell

HARTLE

HATCH or

Blackmon

Hartsell

Blackmon

951

Church of Christ

Doesn't have central office

Spruce Pine Sa Baptist

doesn't take a stand on Death Penalty
left to each individual member

Romans - capital punishment
Lord decreed

obey laws of land
upheld

DP. have advocated
regard life as precious

WR
Central

No

Small No Black Church

left up to individual churches

952

~~1) Bobby Nebelsick~~ - young WM - appears nervous - Δ might have worked for J's father - relation to Δ -

4 2) Bonnie Harper - Y's hair dresser - had not seen Δ in 12yrs - next door neighbor is black - about 50 children - children did not attend integrated schools visits neighbor in yard - no talk in church - Politics bad - messes up your mind

3+/4 (4) Wiley Kelvin Ratliff - Young WM Pharmacist - Wife - Student MCCo - Athens -

3/3+ (5) Mary E. Hackett - Harsh mean looking WF Catholic big glasses - Slow D.P. No opinion Could vote for Δ Neighbors went to funeral -

~~(6) Rick Cagle - chewing gum - basic D.P. - Cause~~

2 (9) Eddie Hood See Q 8 - not answered - W - Was Hung Slow D.P answers - Church of Christ - very ambiguous answers confused No eye-contact very soft spoken - drug-counsel people involved in drugs - against alcohol based on Church - strange eye - self sounds scared + hug out - Δ did not ~~answer~~ asked most Questions asked of other jurors (at 22-27 mins per J - here <11 mins See Juror 35 Dep C

3/3+.4 (10) Joyce M. Nicholson - attractive school Teacher -

(13) Margaret Heelzen - Against D.P. Cause 953
Teacher all Cases

(14) Louise J. Wilson - older WF - super dogmatic short ~~answers~~ Slow answers to Court's questions did not ~~answer~~ properly - does not believe in D.P. ~~must be mandatory~~

3/3+ (16) Maureen B. Bartolello - MAWF Berkeley
See Burch formerly [illegible] Charming - garden + read
Views — books [illegible] DP - Insanity overplayed
a little

(17) Anne W. Cabell [illegible]

3-/3 (18) Patricia Larson Lisc - skinny young WF - casual
processed hair - good DP. Weight Loss Clinic
Would consider age as mitigation - Insanity defense
possible - marijuana can have permanent effect
causing worse than not -
this lady could be a juror!

(19) Carrie L. Hayes 65 yo BM See Ques 4/
Knows [illegible] - [illegible] - don't know about
case - [illegible] family part of yo -
opposed to DP.

4 (20) Myrtle Francis Evans - knew V just to see -
H - GBI agent -

(21) Dorothy Black - older WF, confused by Questions,
gives conflicting answers to Judge's Q
EXCUSED - Cause

2 (22) Evelyn [illegible], [illegible] WF
to 3 opposed to death penalty but if facts warrant it
expressed — CONFUSED " for it "
ATTSON would vote for DP ; how to answer 954
will automatically vote for DP ; will auto vote for LIFE
304 CONFUSED ; views on DP = what going to be

Evelyn Hardy (cont.)
will be; if it could be avoided = I would vote for LIFE
regardless of evidence
STEVE: never been juror in murder; never heard
my church's views on DP, but against DP;
but despite my beliefs on DP I could vote for DP

3+/9 (23) ANNE BANDY COLLINS 023
direct, precise answers to Judge; WF testified in CT-
some backgrd because no blacks in business/leadership pos

? X (24) Lace Ellen Hodges - [illegible] WF Friend of Stranges
for State

3+/4 (25) Victor J De Pennington - older WM - smiley
Understg. Speaker - here 34 yrs Life Law -
playing of Wyatt -

(26) Charlotte S. [illegible] WF
Friend of V-

4+/4 (29) Ray Allen Tate - MAWM - knows VS Stephens -

4 (31) Billy E. Graves

(35) Cancel

3-/3+ (38) Nancy G. Hill - older WM - friendly I's wife taught
children - Weak D.P.

955

1 (39) ~~Mary G. Brown~~ - Claims to Lucky's ½ sister Hostile to the Court - not opposed to D.P. Did not answer question about ~~her~~ in-laws record - Hostile to me - more cordial - smiled @ Wyatt - Race relations OK - Clayton says NOT Looked @ Defense Witness in Ct by defense - Florida's would Rather -

3/4 (39) Chas T Hewlk - MRWM - Good D.P. - Opposed RV - Sees Wyatt @ Church - Signed Petition @ School D/A Problem was pitiful Every computer crater - works at Bank - former Yankee

(40) ~~Betty Bishop~~ Cause

(41) Beverly K. Richardson - ~~Lawful Wife~~ - opposed to D.P.

(43) ~~Miriam Segura~~ - Cause

3+/4 (44) Donald A Hall - Railroad - (BRN w/ Venue)

? (45) ~~Geo. J. McMahon~~ McMahon - ~~COM~~ - from Mass. Neighborhood in D.P. could vote for D.P. - Very weak on D.P.

3+/4+ (46) Claiborne LeRoy -

3+ (47) Selena D Hammond - shy - glasses for D.P.
1:31

(50) ~~Scott Hesson opposed to D.P.~~ Cause -

(52) ~~Robin A. Hall~~ - sees D @ jail - Cause

956

(53) ~~Gertrude Freese~~ Cause

3-/3- (54) ~~Rose D. Hale~~ - Rose D.P. appears flaky not color of skin but very pale ~~but~~ very pale lost. Called Defect Cause

(57) Rhinehart Cause

(62) Jane Lyon - Cause

(63) ~~Robert T. Strauss~~ - ~~Chris Brothers~~ Cause -

3-/4 (64) Elbert J. Roberson - Basic Defect

(65) Moody - Cause

Cause (66) ~~Frankie M. Powell~~ - Elder BF nearly deceased mind ~~Defective~~ Cause defense - for justice to be done -

(67) ~~Shirley M. Powell~~ BF ~~Knows Family~~ - ~~Defective~~ Chas seen BF - Cause

4 (69) John W. Hobar - V taught Children

957

3/4+ (70) Stephen Harner - yuppie Board

3/4+ (71) Kay Fischer - preacher's wife

4/4+ (72) Margaret S. Hibbert

3+/4+ (73) Robert E. Milam - Air Capt. Union Man - Free

3+/4+ (75) Shirley A. Jackson - MAWF Widow Hers & mother Good D.P. -

(77) Kathy [redacted] - Attractive WWF - Housewife

(79) Steve [redacted] - CPA - Lots B. Wisp. soft spoken

3+ (81) C.A. Garrett - good D.P. Board - from Troup County -

(82) Lynda [redacted] - YWF (carrying Textbook

3/3+ (83) Arlene Blackman - Trumpy MWAF Cath. cousin is P.I. Good D.P. 2 Black Friends - great answers on Sanity Cocaine - mess up your brain -

3- (84) Marilyn Garrett - Executive - wealthiest black on Ct during V.D. very short answers - almost impudent - not opposed to D.P. said "yeah" to judge on 4 occasions - 2 jobs Wants Manual questions on insanity - Strong reaction to last question - Father Priest - Looked @ floor during D.P.

3/4 (88) Martha J. Drawer - good D.P. - strong response re D.P. Nephew in Jail - A.R. Knows D's social worker - Tim Strickland

4/4 (89) Teddy Randall Holder - young looking - smiley pleasant type - Blue jeans & short-sleeved shirt

3 (92) Mark Floyd - young WM - for D.P.

3-/4+ (93) Mildred Hill - for D.P. (Wife of #37)

(97) Carol [redacted] y.o. Teacher

(98) Edgar L. Brand, Jr. - BM Q 41 did not understand YD Q 3 - Bad Slow - Wyatts rep's - not questioned re insane - Slow -

4+ (99) Hugh Hubbard - Mason - Knows Y -

(101) Beth [redacted] - knows Y's niece, Ms. Fletcher

(102) [redacted] Kenneth L. Godfrey

3+/4+ (103) Pamela Hyde
+ will be a juror

(105) Cause

3 (106) Don Mark Huffman - young WM -

3+/3 (107) Reggie R. Hatch - Rick Pertuski
Knows Everybody

3+/4 (108) Royal Hatch #107's Uncle

959

(109) Michael Steven Byrd - young moustache - single
opposed to D.P. -

NO (110) [illegible] - Red White Blue - against
[illegible]

3+ (111) Nancy L. Cable

2/3- (113) [illegible] H. Burks - ATT tech - believes insane [illegible]
[illegible]

3+ (114) Virginia Janine Barry - plump pleasant school teacher
Good D.P. knows teachers who gave to reward fund

3+ (115) William Jeffery Howell Yarn - Beard - appears
sparse middle-aged rote question
→ knew Wayne Graft, Gary Clayton
answered yes to 2nd question re determining Life or death

(116) Mixon — excused for cause

(117) Summers - Sin not against Death Penalty
Strong answers - very forceful, Sie wanted to be on
GJ for a long time
Sin real too much on the insanity defense - I find it
hard to prove. possibly could
Strong answers on insanity !!

118 Cedric S Fuqua - efficient, young, humanistic
lives in neighborhood area
I think DP should be in effect prepared to
vote for D.P. Strong Qs + answers

960

310

JUROR NUMBER: 015

THE FOLLOWING LIST OF QUESTIONS HAVE BEEN PROPOUNDED BY THE COURT TO FACILITATE THE JURY SELECTION PROCESS. THE QUESTIONS ARE NOT INTENDED TO PRY INTO YOUR PRIVATE AFFAIRS NOR TO EMBARRASS YOU, BUT TO ASSURE ALL PARTIES THE BEST POSSIBLE JURY FOR THIS CASE.

NOTE: SHOULD YOU REQUIRE ADDITIONAL SPACE FOR YOUR ANSWERS, ATTACHED HERETO IS A BLANK SHEET OF PAPER FOR YOUR USE. PLEASE INDICATE THE QUESTION NUMBER IN WHICH YOU ARE ANSWERING. THERE IS NO NEED TO WRITE THE QUESTION IF YOU WILL INDICATE THE QUESTION NUMBER ONLY.

Dr. & not complete / EXCUSED

1. NAME: Louise F. Wilson

2. ADDRESS: 1603 Flannery St
What area of Floyd County?
North [ ] South [ ] East [X] West [ ]

3. PLACE OF BIRTH: Barton

4. DATE OF BIRTH: 4 Nov 1919 RACE Black

5. LENGTH OF TIME IN FLOYD COUNTY: 46 years

6. PARENTS: FATHER'S NAME Thomas Lee Jones
Living [ ] Deceased [X]
If living, where _____
Place of Birth Barton County
MOTHER'S NAME Hermes Templeton Jones
Living [ ] Deceased [X]
If living, where _____
Place of Birth Barton Co

7. HAVE YOU LIVED AT ANY OTHER ADDRESS DURING THE LAST TEN (10) YEARS? YES [ ] NO [X]
IF YES, WHAT ADDRESS(ES)?

(A) _____
Date: _____

(B) _____
Date: _____

(C) _____
Date: _____

8. PLEASE STATE THE SCHOOLS WHICH YOU HAVE ATTENDED:

(A) GRADE SCHOOL Barton Co DATE 1929-1936

(B) JUNIOR HIGH Night Adult Class DATE 9 months

(C) HIGH SCHOOL _____ DATE _____

(D) COLLEGE _____ DATE _____

ANTI-SOCIAL

Is she related to Willie James Wilson
resides at 1606 Flannery St.

(E) GRADUATE SCHOOL _____ DATE _____

(F) VOCATIONAL OR TECHNICAL SCHOOLS

_____ DATE _____

DEGREE, CERTIFICATE, DIPLOMAS HELD

_____ DATE _____

(G) PROFESSIONAL SCHOOL _____ DATE _____

9. OCCUPATION: (Please be definite. If you are self-employed, state what your business is; if you are employed, state your employer; if you are a teacher, state what grade or subjects and at what school; if you are in civil service, state what you do and where; if you are in the Armed Forces, state your rank and branch; if you are retired, please explain your principle employment before you retired.)

Retired from a Bank & Private Home
Still do Baby sitt 3 Day-24 Hour

10. WHAT IS YOUR POSITION, AND WHAT ARE YOUR DUTIES IN THAT POSITION? _____

_____

11. HOW LONG HAVE YOU BEEN WITH THE SAME EMPLOYER? _____

12. FOR WHOM ELSE HAVE YOU WORKED IN THE PAST TEN YEARS?

(A) _____ DATES _____

(B) _____ DATES _____

(C) _____ DATES _____

13. HAVE YOU EVER BEEN IN MILITARY SERVICE? No

WHAT BRANCH? _____ DATES _____

14. MARITAL STATUS: Married _____ Separated _____

Single _____ Divorced _____ Other Widow

If Married, how many years? _____

15. SPOUSE'S NAME _____

16. SPOUSE'S OCCUPATION (Follow the same instructions as to your own occupation in Question Number 9 above):

_____

_____

17. SPOUSE'S EDUCATION LEVEL: _____

18. YOUR RELIGIOUS AFFILIATION: United Methodist

19. HOW OFTEN DO YOU ATTEND CHURCH? Every Sunday and Some Weekday

PAGE 2

20. HOW MANY CHILDREN DO YOU HAVE? _____

Boys: _____ Ages: _____

Girls: _____ Ages: _____

21. IF CHILDREN ARE EMPLOYED, PLEASE STATE OCCUPATIONS:

_____

_____

22. HAVE YOU EVER, IN ANY WAY, BEEN INVOLVED IN ANY FORM OR KIND OF LAW ENFORCEMENT WORK INCLUDING, BUT NOT LIMITED TO, SECURITY GUARD, POLICE, SHORE PATROL, MILITARY POLICE, AIR POLICE, SHERIFF, OR DEPUTY SHERIFF, IRS INVESTIGATOR, F.B.I., G.B.I., PRIVATE INVESTIGATOR, PRISON OR JAIL GUARD, ET CETERA? (If so, please state when, where and in what capacity.)

No

_____

_____

23. DO YOU HAVE A CLOSE FRIEND OR RELATIVE WHO IS NOW OR HAS EVER BEEN, IN ANY WAY, INVOLVED IN LAW ENFORCEMENT AS MENTIONED ABOVE? (If so, please state who, what relation to you, when, where, and in what capacity.)

_____

24. HAVE YOU EVER BEEN THE VICTIM OF A CRIME OF VIOLENCE? (If so, please state what, where and when.)

_____

_____

25. DO YOU HAVE A CLOSE FRIEND OR RELATIVE WHO HAS BEEN A VICTIM OF A CRIME OF VIOLENCE? (If so, please state what kind of case and when it occurred.)

No

_____

26. HAVE YOU EVER BEEN A WITNESS IN A CRIMINAL CASE (INCLUDING COURT MARTIAL)? (If so, please state what kind of case, where, and when.)

_____

27. HAVE YOU EVER SERVED ON A GRAND JURY? _____
If Yes, please answer the following questions:

DID YOU SERVE IN THE FEDERAL COURT? yes

DID YOU SERVE IN SUPERIOR COURT? Yes

DID YOU SERVE AS FOREPERSON? _____

28. HAVE YOU EVER SERVED ON A JURY IN A CRIMINAL CASE? _____
If Yes, please answer the following questions:

DID YOU SERVE IN THE FEDERAL COURT? [illegible]

DID YOU SERVE IN SUPERIOR COURT? _____

DID YOU SERVE AS FOREPERSON IN EITHER TYPE? No 5

WHAT KIND OF CASE? _____

DID YOU REACH A VERDICT? _____

29. HAVE YOU EVER SERVED ON A TRIAL JURY IN A CIVIL OR DOMESTIC CASE? If Yes, please answer the following questions:

DID YOU SERVE IN THE FEDERAL COURT? _____

DID YOU SERVE IN SUPERIOR COURT? _____

DID YOU SERVE AS FOREPERSON IN EITHER TYPE? _____

WHAT KIND OF CASE? _____

DID YOU REACH A VERDICT? _____

30. HAVE YOU EVER SERVED ON A COURT MARTIAL? _____
If Yes, please answer the following questions:

WHAT KIND OF CASE? _____

DID YOU REACH A VERDICT? _____

31. HAVE YOU EVER BEEN CONVICTED OF ANY CRIME OTHER THAN MINOR TRAFFIC OFFENSES? (If so, state the offense, date of conviction and the sentence imposed.)

_____

_____

32. DO YOU HAVE A CLOSE FRIEND OR RELATIVE WHO HAS BEEN ACCUSED OR CONVICTED OF A CRIME OF VIOLENCE? (If so, state the offense, the date of conviction, sentence imposed or if the charges were dismissed.)

_____

No

33. HAVE YOU EVER BEEN ELECTED OR APPOINTED TO PUBLIC OFFICE? If so, to what office, where and when?

_____

34. WITHIN THE LAST FIVE (5) YEARS, HAVE YOU BELONGED TO ANY BUSINESS, SOCIAL, FRATERNAL SERVICE, OR CHARITABLE CLUB?

Church work - Lodge - Not singing

_____

35. WITHIN THE LAST FIVE (5) YEARS, HAVE YOU BEEN ELECTED OR APPOINTED TO HOLD AN OFFICE IN ANY BUSINESS, SOCIAL, FRATERNAL CLUB, OR ON ANY BOARD OF DIRECTORS OR TRUSTEES? If so, to what office, where and when?

_____

_____

36. ARE YOU RENTING OR BUYING YOUR PRESENT RESIDENCE? _____

37. WHAT HOBBIES OR SPECIAL INTERESTS DO YOU HAVE NOW, OR HAVE YOU HAD IN THE PAST?

_____

_____

38. WHAT IS YOUR PRIMARY SOURCE OF NEWS INFORMATION?

NEWSPAPER_____ T. V. X RADIO X OTHER_____

39. WHAT NEWSPAPERS DO YOU READ AND HOW MANY TIMES PER WEEK WITH EACH ONE?

_____

_____

40. ARE THE PEOPLE YOU USUALLY RUN INTO IN YOUR NEIGHBORHOOD:

All White_____ All Black_____
Both Black and White X

41. THE DEFENDANT, TIMOTHY TYRONE FOSTER, IS A MEMBER OF THE NEGRO RACE. THE VICTIM, QUEEN MADGE WHITE, WAS A WHITE CAUCASIAN. WILL THESE FACTS PREJUDICE YOU AGAINST TIMOTHY TYRONE FOSTER OR AFFECT YOUR ABILITY TO RENDER A FAIR AND IMPARTIAL VERDICT BASED SOLELY UPON THE EVIDENCE?

YES _____ NO _____

42. IF YOU ARE SELECTED TO SERVE AS A MEMBER OF THIS JURY, YOU AND OTHER JURORS WILL BE SEQUESTERED; THAT IS, YOU WILL BE STAYING IN A MOTEL APART UNTO YOURSELVES WHEN NOT ATTENDING THE TRIAL ITSELF. WOULD BEING ON SUCH A JURY CAUSE YOU ANY UNDUE HARDSHIP OR DIFFICULTIES? IF SO, PLEASE EXPLAIN.

NO answer?

_____

_____

43. DO YOU HAVE ANY HEALTH PROBLEMS THAT MIGHT CAUSE YOU ANY DIFFICULTY OR HARDSHIP IF YOU WERE SELECTED AS A JUROR IN THIS CASE? IF YES, PLEASE EXPLAIN.

_____

44. DO YOU HAVE ANY PERSONAL, FAMILY OR BUSINESS PROBLEMS THAT WOULD CAUSE YOU DIFFICULTY OR HARDSHIP IF YOU WERE SELECTED AS A JUROR IN THIS CASE? IF YES, PLEASE EXPLAIN.

_____

Louise F. Wilson 4-20-87
JUROR, PLEASE SIGN FULL NAME HERE DATE SIGNED

JUROR NUMBER: 69

State v Foster 86-F-2218-2
70/103

THE FOLLOWING LIST OF QUESTIONS HAVE BEEN PROPOUNDED BY THE COURT TO FACILITATE THE JURY SELECTION PROCESS. THE QUESTIONS ARE NOT INTENDED TO PRY INTO YOUR PRIVATE AFFAIRS NOR TO EMBARRASS YOU, BUT TO ASSURE ALL PARTIES THE BEST POSSIBLE JURY FOR THIS CASE.

EXCUSED BY MOTION OF STATE NO OBJECTION BY Δ

NOTE: SHOULD YOU REQUIRE ADDITIONAL SPACE FOR YOUR ANSWERS, ATTACHED HERETO IS A BLANK SHEET OF PAPER FOR YOUR USE. PLEASE INDICATE THE QUESTION NUMBER IN WHICH YOU ARE ANSWERING. THERE IS NO NEED TO WRITE THE QUESTION IF YOU WILL INDICATE THE QUESTION NUMBER ONLY.

1. NAME: Jackie L. Woodard

2. ADDRESS: Hasty Rd Box 142
What area of Floyd County?
North [X] South [ ] East [ ] West [ ]

3. PLACE OF BIRTH: Barton County

4. DATE OF BIRTH: 3-7-23 RACE Black

5. LENGTH OF TIME IN FLOYD COUNTY: 14 years

6. PARENTS: FATHER'S NAME Walter McClure
Living [ ] Deceased [X]

If living, where _____

Place of Birth Barton County.

MOTHER'S NAME Minnie Nell McClure
Living [ ] Deceased [X]

If living, where _____

Place of Birth Barton County

7. HAVE YOU LIVED AT ANY OTHER ADDRESS DURING THE LAST TEN (10) YEARS? YES [ ] NO [X]
IF YES, WHAT ADDRESS(ES)?

(A) _____

Date: _____

(B) _____

Date: _____

(C) _____

Date: _____

8. PLEASE STATE THE SCHOOLS WHICH YOU HAVE ATTENDED:

(A) GRADE SCHOOL _____ DATE 19-29-36

(B) ~~JUNIOR HIGH~~ Basic Adult Ctr DATE 19-65-1966

(C) HIGH SCHOOL _____ DATE _____

(D) COLLEGE _____ DATE _____

Not reasonable DQ #4

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(E) GRADUATE SCHOOL _____ DATE _____

(F) VOCATIONAL OR TECHNICAL SCHOOLS

_____ DATE _____

DEGREE, CERTIFICATE, DIPLOMAS HELD:

High School level. DATE 19-66

(G) PROFESSIONAL SCHOOL _____ DATE _____

9. OCCUPATION: (Please be definite. If you are self-employed, state what your business is; if you are employed, state your employer; if you are a teacher, state what grade or subjects and at what school; if you are in civil service, state what you do and where; if you are in the Armed Forces, state your rank and branch; if you are retired, please explain your principle employment before you retired.) (Retired)

I was a Carton Former at union Carbide in Cartersville Ga

10. WHAT IS YOUR POSITION, AND WHAT ARE YOUR DUTIES IN THAT POSITION? _____

11. HOW LONG HAVE YOU BEEN WITH THE SAME EMPLOYER? _____

12. FOR WHOM ELSE HAVE YOU WORKED IN THE PAST TEN YEARS?

(A) _____ DATES _____

(B) _____ DATES _____

(C) _____ DATES _____

13. HAVE YOU EVER BEEN IN MILITARY SERVICE? _____

WHAT BRANCH? _____ DATES _____

14. MARITAL STATUS: Married _____ Separated _____

Single _____ Divorced _____ Other Widow

If Married, how many years? _____

15. SPOUSE'S NAME _____

16. SPOUSE'S OCCUPATION (Follow the same instructions as to your own occupation in Question Number 9 above):

_____

_____

17. SPOUSE'S EDUCATION LEVEL: _____

18. YOUR RELIGIOUS AFFILIATION: Baptist

19. HOW OFTEN DO YOU ATTEND CHURCH? Every Sunday

20. HOW MANY CHILDREN DO YOU HAVE? _____

Boys: 1 Ages: 45

Girls: 1 Ages: 47

21. IF CHILDREN ARE EMPLOYED, PLEASE STATE OCCUPATIONS:

Married and Son in Castergalls
Daughter in Detroit Mich

22. HAVE YOU EVER, IN ANY WAY, BEEN INVOLVED IN ANY FORM OR KIND OF LAW ENFORCEMENT WORK INCLUDING, BUT NOT LIMITED TO, SECURITY GUARD, POLICE, SHORE PATROL, MILITARY POLICE, AIR POLICE, SHERIFF, OR DEPUTY SHERIFF, IRS INVESTIGATOR, F.B.I., G.B.I., PRIVATE INVESTIGATOR, PRISON OR JAIL GUARD, ET CETERA? (If so, please state when, where and in what capacity.)

None

23. DO YOU HAVE A CLOSE FRIEND OR RELATIVE WHO IS NOW OR HAS EVER BEEN, IN ANY WAY, INVOLVED IN LAW ENFORCEMENT AS MENTIONED ABOVE? (If so, please state who, what relation to you, when, where, and in what capacity.)

No

24. HAVE YOU EVER BEEN THE VICTIM OF A CRIME OF VIOLENCE? (If so, please state what, where and when.)

No

25. DO YOU HAVE A CLOSE FRIEND OR RELATIVE WHO HAS BEEN A VICTIM OF A CRIME OF VIOLENCE? (If so, please state what kind of case and when it occurred.)

No

26. HAVE YOU EVER BEEN A WITNESS IN A CRIMINAL CASE (INCLUDING COURT MARTIAL)? (If so, please state what kind of case, where, and when.)

27. HAVE YOU EVER SERVED ON A GRAND JURY? Yes
If Yes, please answer the following questions:

DID YOU SERVE IN THE FEDERAL COURT? _____

DID YOU SERVE IN SUPERIOR COURT? Yes

DID YOU SERVE AS FOREPERSON? No

28. HAVE YOU EVER SERVED ON A JURY IN A CRIMINAL CASE? No
If Yes, please answer the following questions:

DID YOU SERVE IN THE FEDERAL COURT? _____

DID YOU SERVE IN SUPERIOR COURT? _____

DID YOU SERVE AS FOREPERSON IN EITHER TYPE? no

WHAT KIND OF CASE? _____

DID YOU REACH A VERDICT? _____

29. HAVE YOU EVER SERVED ON A TRIAL JURY IN A CIVIL OR DOMESTIC CASE? If Yes, please answer the following questions:

DID YOU SERVE IN THE FEDERAL COURT? _____

DID YOU SERVE IN SUPERIOR COURT? _____

DID YOU SERVE AS FOREPERSON IN EITHER TYPE? _____

WHAT KIND OF CASE? _____

DID YOU REACH A VERDICT? _____

30. HAVE YOU EVER SERVED ON A COURT MARTIAL? no
If Yes, please answer the following questions:

WHAT KIND OF CASE? _____

DID YOU REACH A VERDICT? _____

31. HAVE YOU EVER BEEN CONVICTED OF ANY CRIME OTHER THAN MINOR TRAFFIC OFFENSES? (If so, state the offense, date of conviction and the sentence imposed.)

_____

_____

32. DO YOU HAVE A CLOSE FRIEND OR RELATIVE WHO HAS BEEN ACCUSED OR CONVICTED OF A CRIME OF VIOLENCE? (If so, state the offense, the date of conviction, sentence imposed or if the charges were dismissed.)

no

_____

33. HAVE YOU EVER BEEN ELECTED OR APPOINTED TO PUBLIC OFFICE? If so, to what office, where and when?

no

34. WITHIN THE LAST FIVE (5) YEARS, HAVE YOU BELONGED TO ANY BUSINESS, SOCIAL, FRATERNAL SERVICE, OR CHARITABLE CLUB?

_____

_____

35. WITHIN THE LAST FIVE (5) YEARS, HAVE YOU BEEN ELECTED OR APPOINTED TO HOLD AN OFFICE IN ANY BUSINESS, SOCIAL, FRATERNAL CLUB, OR ON ANY BOARD OF DIRECTORS OR TRUSTEES? If so, to what office, where and when?

_____

_____

36. ARE YOU RENTING OR BUYING YOUR PRESENT RESIDENCE? Buying

37. WHAT HOBBIES OR SPECIAL INTERESTS DO YOU HAVE NOW, OR HAVE YOU HAD IN THE PAST? Walking 2 miles a day, Reading

38. WHAT IS YOUR PRIMARY SOURCE OF NEWS INFORMATION?

NEWSPAPER_____ T. V._____ RADIO X OTHER_____

39. WHAT NEWSPAPERS DO YOU READ AND HOW MANY TIMES PER WEEK WITH EACH ONE?

Tribune News a Daily.

40. ARE THE PEOPLE YOU USUALLY RUN INTO IN YOUR NEIGHBORHOOD:

All White_____ All Black_____
Both Black and White X

41. THE DEFENDANT, TIMOTHY TYRONE FOSTER, IS A MEMBER OF THE NEGRO RACE. THE VICTIM, QUEEN MADGE WHITE, WAS A WHITE CAUCASIAN. WILL THESE FACTS PREJUDICE YOU AGAINST TIMOTHY TYRONE FOSTER OR AFFECT YOUR ABILITY TO RENDER A FAIR AND IMPARTIAL VERDICT BASED SOLELY UPON THE EVIDENCE?

YES _____ NO X

42. IF YOU ARE SELECTED TO SERVE AS A MEMBER OF THIS JURY, YOU AND OTHER JURORS WILL BE SEQUESTERED; THAT IS, YOU WILL BE STAYING IN A MOTEL APART UNTO YOURSELVES WHEN NOT ATTENDING THE TRIAL ITSELF. WOULD BEING ON SUCH A JURY CAUSE YOU ANY UNDUE HARDSHIP OR DIFFICULTIES? IF SO, PLEASE EXPLAIN.

43. DO YOU HAVE ANY HEALTH PROBLEMS THAT MIGHT CAUSE YOU ANY DIFFICULTY OR HARDSHIP IF YOU WERE SELECTED AS A JUROR IN THIS CASE? IF YES, PLEASE EXPLAIN.

44. DO YOU HAVE ANY PERSONAL, FAMILY OR BUSINESS PROBLEMS THAT WOULD CAUSE YOU DIFFICULTY OR HARDSHIP IF YOU WERE SELECTED AS A JUROR IN THIS CASE? IF YES, PLEASE EXPLAIN.

Fannie L. Wofford
JUROR, PLEASE SIGN FULL NAME HERE

4/20/87
DATE SIGNED

JUROR NUMBER: 067

THE FOLLOWING LIST OF QUESTIONS HAVE BEEN PREPOUNDED BY THE COURT TO FACILITATE THE JURY SELECTION PROCESS. THE QUESTIONS ARE NOT INTENDED TO PRY INTO YOUR PRIVATE AFFAIRS NOR TO EMBARRASS YOU, BUT TO ASSURE ALL PARTIES THE BEST POSSIBLE JURY FOR THIS CASE.

70
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NOTE: SHOULD YOU REQUIRE ADDITIONAL SPACE FOR YOUR ANSWERS, ATTACHED HERETO IS A BLANK SHEET OF PAPER FOR YOUR USE. PLEASE INDICATE THE QUESTION NUMBER IN WHICH YOU ARE ANSWERING. THERE IS NO NEED TO WRITE THE QUESTION IF YOU WILL INDICATE THE QUESTION NUMBER ONLY.

1. NAME: Shirley A. Powell

2. ADDRESS: 727 N. 4th Ave. Apt #5
What area of Floyd County?
North [X] South [ ] East [ ] West [ ]

3. PLACE OF BIRTH: Chicago Ill ~~Cook County~~

4. DATE OF BIRTH: 4-1-62 RACE: Black

5. LENGTH OF TIME IN FLOYD COUNTY: 20 years

6. PARENTS: FATHER'S NAME Veloyd Akins
Living [X] Deceased [ ]
If living, where Chicago Ill
Place of Birth Chicago Ill.
MOTHER'S NAME Frances Akins
Living [X] Deceased [ ]
If living, where Rome Georgia
Place of Birth Rome Georgia

7. HAVE YOU LIVED AT ANY OTHER ADDRESS DURING THE LAST TEN (10) YEARS? YES [X] NO [ ]
IF YES, WHAT ADDRESS(ES)?
(A) 1 B. East 11½ Street
Date: 1985 - 1987
(B) 111 East 13th Street
Date: 984 - 1982
(C) 101 East 15th Street
Date: 1982 -

8. PLEASE STATE THE SCHOOLS WHICH YOU HAVE ATTENDED:
(A) GRADE SCHOOL Southeast Ele. DATE 1974 - 1967
(B) JUNIOR HIGH East Rome ~~[illegible]~~ High DATE 1976 - 1974
(C) HIGH SCHOOL East Rome High 1976 - DATE 1978
(D) COLLEGE _____ DATE _____

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JUROR NUMBER: 067

(E) GRADUATE SCHOOL East Rowe High DATE Didn't Graduate

(F) VOCATIONAL OR TECHNICAL SCHOOLS:

None DATE

DEGREE, CERTIFICATE, DIPLOMAS HELD

None DATE

(G) PROFESSIONAL SCHOOL None DATE

9. OCCUPATION: (Please be definite. If you are self-employed, state what your business is; if you are employed, state your employer; if you are a teacher, state what grade or subjects and at what school; if you are in civil service, state what you do and where; if you are in the Armed Forces, state your rank and branch; if you are retired, please explain your principle employment before you retired.)

Cardinal Glass Manufactory

10. WHAT IS YOUR POSITION, AND WHAT ARE YOUR DUTIES IN THAT POSITION? Inspector

11. HOW LONG HAVE YOU BEEN WITH THE SAME EMPLOYER? March 2nd Week 1987

12. FOR WHOM ELSE HAVE YOU WORKED IN THE PAST TEN YEARS?

(A) Floyd Medical Ctr. DATES 1987 Jan. - March

(B) L.J. Spector Glass Co. DATES Jan 1987 - Feb. 1985

(C) Holiday Inn DATES Feb 1985 - July 1984

13. HAVE YOU EVER BEEN IN MILITARY SERVICE? No

WHAT BRANCH? — DATES —

14. MARITAL STATUS: Married ____ Separated V

Single ____ Divorced ____ Other ____

If Married, how many years? 5 yrs

15. SPOUSE'S NAME Alvin Powell

16. SPOUSE'S OCCUPATION (Follow the same instructions as to your own occupation in Question Number 9 above):

Unknown

17. SPOUSE'S EDUCATION LEVEL: 12 grade Graduate

18. YOUR RELIGIOUS AFFILIATION: Holiness

19. HOW OFTEN DO YOU ATTEND CHURCH? Once a month

974

JUROR NUMBER:_____

20. HOW MANY CHILDREN DO YOU HAVE? 1

Boys: 1 Ages: 8

Girls:_____ Ages:_____

21. IF CHILDREN ARE EMPLOYED, PLEASE STATE OCCUPATIONS:

_____

_____

22. HAVE YOU EVER, IN ANY WAY, BEEN INVOLVED IN ANY FORM OR KIND OF LAW ENFORCEMENT WORK INCLUDING, BUT NOT LIMITED TO, SECURITY GUARD, POLICE, SHORE PATROL, MILITARY POLICE, AIR POLICE, SHERIFF, OR DEPUTY SHERIFF, IRS INVESTIGATOR, F.B.I., G.B.I., PRIVATE INVESTIGATOR, PRISON OR JAIL GUARD, ET CETERA? (If so, please state when, where and in what capacity.)

No

_____

23. DO YOU HAVE A CLOSE FRIEND OR RELATIVE WHO IS NOW OR HAS EVER BEEN, IN ANY WAY, INVOLVED IN LAW ENFORCEMENT AS MENTIONED ABOVE? (If so, please state who, what relation to you, when, where, and in what capacity.)

No

24. HAVE YOU EVER BEEN THE VICTIM OF A CRIME OF VIOLENCE? (If so, please state what, where and when.)

No

_____

25. DO YOU HAVE A CLOSE FRIEND OR RELATIVE WHO HAS BEEN A VICTIM OF A CRIME OF VIOLENCE? (If so, please state what kind of case and when it occurred.)

No

26. HAVE YOU EVER BEEN A WITNESS IN A CRIMINAL CASE (INCLUDING COURT MARTIAL)? (If so, please state what kind of case, where, and when.)

No

27. HAVE YOU EVER SERVED ON A GRAND JURY? No
If Yes, please answer the following questions:

DID YOU SERVE IN THE FEDERAL COURT? No

DID YOU SERVE IN SUPERIOR COURT? No

DID YOU SERVE AS FOREPERSON? No

28. HAVE YOU EVER SERVED ON A JURY IN A CRIMINAL CASE? No
If Yes, please answer the following questions:

DID YOU SERVE IN THE FEDERAL COURT? No

DID YOU SERVE IN SUPERIOR COURT? No

975

JUROR NUMBER: 061

DID YOU SERVE AS FOREPERSON IN EITHER TYPE? No

WHAT KIND OF CASE? None

DID YOU REACH A VERDICT? No

29. HAVE YOU EVER SERVED ON A TRIAL JURY IN A CIVIL OR DOMESTIC CASE? If Yes, please answer the following questions:

DID YOU SERVE IN THE FEDERAL COURT? No

DID YOU SERVE IN SUPERIOR COURT? No

DID YOU SERVE AS FOREPERSON IN EITHER TYPE? No

WHAT KIND OF CASE? None

DID YOU REACH A VERDICT? No

30. HAVE YOU EVER SERVED ON A COURT MARTIAL? No
If Yes, please answer the following questions:

WHAT KIND OF CASE? None

DID YOU REACH A VERDICT? No

31. HAVE YOU EVER BEEN CONVICTED OF ANY CRIME OTHER THAN MINOR TRAFFIC OFFENSES? (If so, state the offense, date of conviction and the sentence imposed.)

No

32. DO YOU HAVE A CLOSE FRIEND OR RELATIVE WHO HAS BEEN ACCUSED OR CONVICTED OF A CRIME OF VIOLENCE? (If so, state the offense, the date of conviction, sentence imposed or if the charges were dismissed.)

No

33. HAVE YOU EVER BEEN ELECTED OR APPOINTED TO PUBLIC OFFICE? If so, to what office, where and when?

No

34. WITHIN THE LAST FIVE (5) YEARS, HAVE YOU BELONGED TO ANY BUSINESS, SOCIAL, FRATERNAL SERVICE, OR CHARITABLE CLUB?

No

35. WITHIN THE LAST FIVE (5) YEARS, HAVE YOU BEEN ELECTED OR APPOINTED TO HOLD AN OFFICE IN ANY BUSINESS, SOCIAL, FRATERNAL CLUB, OR ON ANY BOARD OF DIRECTORS OR TRUSTEES? If so, to what office, where and when?

No

976

JUROR NUMBER: 067

36. ARE YOU RENTING OR BUYING YOUR PRESENT RESIDENCE? Renting

37. WHAT HOBBIES OR SPECIAL INTERESTS DO YOU HAVE NOW, OR HAVE YOU HAD IN THE PAST? None

38. WHAT IS YOUR PRIMARY SOURCE OF NEWS INFORMATION?

NEWSPAPER ✓ T. V. ✓ RADIO ✓ OTHER _____

39. WHAT NEWSPAPERS DO YOU READ AND HOW MANY TIMES PER WEEK WITH EACH ONE?

Rome News Every day

40. ARE THE PEOPLE YOU USUALLY RUN INTO IN YOUR NEIGHBORHOOD:

All White _____ All Black _____
Both Black and White ✓

41. THE DEFENDANT, TIMOTHY TYRONE FOSTER, IS A MEMBER OF THE NEGRO RACE. THE VICTIM, QUEEN MADGE WHITE, WAS A WHITE CAUCASIAN. WILL THESE FACTS PREJUDICE YOU AGAINST TIMOTHY TYRONE FOSTER OR AFFECT YOUR ABILITY TO RENDER A FAIR AND IMPARTIAL VERDICT BASED SOLELY UPON THE EVIDENCE?

YES _____ NO ✓

42. IF YOU ARE SELECTED TO SERVE AS A MEMBER OF THIS JURY, YOU AND OTHER JURORS WILL BE SEQUESTERED; THAT IS, YOU WILL BE STAYING IN A MOTEL APART UNTO YOURSELVES WHEN NOT ATTENDING THE TRIAL ITSELF. WOULD BEING ON SUCH A JURY CAUSE YOU ANY UNDUE HARDSHIP OR DIFFICULTIES? IF SO, PLEASE EXPLAIN.

My son is 9 yrs old, there will be a problem getting someone to get him from school and take care of him while I'm

43. DO YOU HAVE ANY HEALTH PROBLEMS THAT MIGHT CAUSE YOU ANY DIFFICULTY OR HARDSHIP IF YOU WERE SELECTED AS A JUROR IN THIS CASE? IF YES, PLEASE EXPLAIN.

44. DO YOU HAVE ANY PERSONAL, FAMILY OR BUSINESS PROBLEMS THAT WOULD CAUSE YOU DIFFICULTY OR HARDSHIP IF YOU WERE SELECTED AS A JUROR IN THIS CASE? IF YES, PLEASE EXPLAIN.

My son and jot need one.

Shirley Annette Powell
JUROR, PLEASE SIGN FULL NAME HERE

4-20-87
DATE SIGNED

977

JUROR NUMBER: 009

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82/103

THE FOLLOWING LIST OF QUESTIONS HAVE BEEN PROPOUNDED BY THE COURT TO FACILITATE THE JURY SELECTION PROCESS. THE QUESTIONS ARE NOT INTENDED TO PRY INTO YOUR PRIVATE AFFAIRS NOR TO EMBARRASS YOU, BUT TO ASSURE ALL PARTIES THE BEST POSSIBLE JURY FOR THIS CASE.

NOTE: SHOULD YOU REQUIRE ADDITIONAL SPACE FOR YOUR ANSWERS, ATTACHED HERETO IS A BLANK SHEET OF PAPER FOR YOUR USE. PLEASE INDICATE THE QUESTION NUMBER IN WHICH YOU ARE ANSWERING. THERE IS NO NEED TO WRITE THE QUESTION IF YOU WILL INDICATE THE QUESTION NUMBER ONLY.

1. NAME: Eddie Hood

2. ADDRESS: 13 Copeland ST. Rome, GA
What area of Floyd County?
North [X] South [] East [] West []

3. PLACE OF BIRTH: Piedmont Ala.

4. DATE OF BIRTH: 5-26-40 RACE BLACK

5. LENGTH OF TIME IN FLOYD COUNTY: 39 yrs.

6. PARENTS: FATHER'S NAME Octavus Hood
Living [] Deceased [X]

If living, where

Place of Birth Piedmont Ala.

MOTHER'S NAME Laura Neal
Living [X] Deceased []

If living, where Cave Spring, GA

Place of Birth Indianola Indiana

7. HAVE YOU LIVED AT ANY OTHER ADDRESS DURING THE LAST TEN (10) YEARS? YES [] NO [X]
IF YES, WHAT ADDRESS(ES)?

(A)

Date:

(B)

Date:

(C)

Date:

8. PLEASE STATE THE SCHOOLS WHICH YOU HAVE ATTENDED:

(A) GRADE SCHOOL 8 DATE 1946-1951

(B) JUNIOR HIGH 4 DATE 1951-1955

(C) HIGH SCHOOL 4 DATE 1955-1959

(D) COLLEGE DATE

PAGE 1

ANTI-social - look for eye contact etc

979

(E) GRADUATE SCHOOL _____ DATE _____

(F) VOCATIONAL OR TECHNICAL SCHOOLS

_____ DATE _____

DEGREE, CERTIFICATE, DIPLOMAS HELD

_____ DATE _____

(G) PROFESSIONAL SCHOOL _____ DATE _____

9. OCCUPATION: (Please be definite. If you are self-employed, state what your business is; if you are employed, state your employer; if you are a teacher, state what grade or subjects and at what school; if you are in civil service, state what you do and where; if you are in the Armed Forces, state your rank and branch; if you are retired, please explain your principle employment before you retired.)

GA KRAFT Co. ~~The GA Pacific Corp. Pulp Mill~~

10. WHAT IS YOUR POSITION, AND WHAT ARE YOUR DUTIES IN THAT POSITION? ASSITRACE COOKIN PULP MILL dept.

11. HOW LONG HAVE YOU BEEN WITH THE SAME EMPLOYER? 17 yrs.

12. FOR WHOM ELSE HAVE YOU WORKED IN THE PAST TEN YEARS?

(A) _____ DATES _____

(B) _____ DATES _____

(C) _____ DATES _____

13. HAVE YOU EVER BEEN IN MILITARY SERVICE? NO

WHAT BRANCH? _____ DATES _____

14. MARITAL STATUS: Married YES Separated _____

Single _____ Divorced _____ Other _____

If Married, how many years? 26 yrs

15. SPOUSE'S NAME ELNORA Hood

16. ~~SPOUSE'S OCCUPATION (Follow the same instructions as to your own occupation in Question Number 9 above):~~

NORTHWEST GEORGIA REGINAL HOSPITAL
SUPERVISOR IN FOOD SERVICE

17. SPOUSE'S EDUCATION LEVEL: 11 Grade

18. YOUR RELIGIOUS AFFILIATION: Church of Christ

19. HOW OFTEN DO YOU ATTEND CHURCH? every Sunday

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JUROR NUMBER: 009

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84/103

20. HOW MANY CHILDREN DO YOU HAVE? 4

Boys: 3 Ages: 26, 22, 18

Girls: 1 Ages: 24

21. IF CHILDREN ARE EMPLOYED, PLEASE STATE OCCUPATIONS:

1 Assistance manager at Burger King

2 shipping dept. Helper Battery Machine Co.

22. HAVE YOU EVER, IN ANY WAY, BEEN INVOLVED IN ANY FORM OR KIND OF LAW ENFORCEMENT WORK INCLUDING, BUT NOT LIMITED TO, SECURITY GUARD, POLICE, SHORE PATROL, MILITARY POLICE, AIR POLICE, SHERIFF, OR DEPUTY SHERIFF, IRS INVESTIGATOR, F.B.I., G.B.I., PRIVATE INVESTIGATOR, PRISON OR JAIL GUARD, ET CETERA? (If so, please state when, where and in what capacity.)

No

23. DO YOU HAVE A CLOSE FRIEND OR RELATIVE WHO IS NOW OR HAS EVER BEEN, IN ANY WAY, INVOLVED IN LAW ENFORCEMENT AS MENTIONED ABOVE? (If so, please state who, what relation to you, when, where, and in what capacity.)

No

24. HAVE YOU EVER BEEN THE VICTIM OF A CRIME OF VIOLENCE? (If so, please state what, where and when.)

No

25. DO YOU ~~HAVE A CLOSE FRIEND~~ OR RELATIVE WHO HAS BEEN A VICTIM OF A CRIME OF VIOLENCE? (If so, please state what kind of case and when it occurred.)

No

26. HAVE YOU EVER BEEN A WITNESS IN A CRIMINAL CASE (INCLUDING COURT MARTIAL)? (If so, please state what kind of case, where, and when.)

No

27. HAVE YOU EVER SERVED ON A GRAND JURY? No

If Yes, please answer the following questions:

DID YOU SERVE IN THE FEDERAL COURT? _____

DID YOU SERVE IN SUPERIOR COURT? _____

DID YOU SERVE AS FOREPERSON? _____

28. HAVE YOU EVER SERVED ON A JURY IN A CRIMINAL CASE? Yes

If Yes, please answer the following questions:

DID YOU SERVE IN THE FEDERAL COURT? _____

DID YOU SERVE IN SUPERIOR COURT? Yes

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DID YOU SERVE AS FOREPERSON IN EITHER TYPE? _____

WHAT KIND OF CASE? _____ _____

DID YOU REACH A VERDICT? Yes

29. HAVE YOU EVER SERVED ON A TRIAL JURY IN A CIVIL OR DOMESTIC CASE? If Yes, please answer the following questions:

DID YOU SERVE IN THE FEDERAL COURT? _____

DID YOU SERVE IN SUPERIOR COURT? Yes

DID YOU SERVE AS FOREPERSON IN EITHER TYPE? _____

WHAT KIND OF CASE? Civil

DID YOU REACH A VERDICT? Yes

30. HAVE YOU EVER SERVED ON A COURT MARTIAL? No
If Yes, please answer the following questions:

WHAT KIND OF CASE? _____

DID YOU REACH A VERDICT? _____

31. HAVE YOU EVER BEEN CONVICTED OF ANY CRIME OTHER THAN MINOR TRAFFIC OFFENSES? (If so, state the offense, date of conviction and the sentence imposed.)

No

32. DO YOU HAVE A CLOSE FRIEND OR RELATIVE WHO HAS BEEN ACCUSED OR CONVICTED OF A CRIME OF VIOLENCE? (If so, state the offense, the date of conviction, sentence imposed or if the charges were dismissed.)

No

33. HAVE YOU EVER BEEN ELECTED OR APPOINTED TO PUBLIC OFFICE? If so, to what office, where and when?

No

34. WITHIN THE LAST FIVE (5) YEARS, HAVE YOU BELONGED TO ANY BUSINESS, SOCIAL, FRATERNAL SERVICE, OR CHARITABLE CLUB?

No

35. WITHIN THE LAST FIVE (5) YEARS, HAVE YOU BEEN ELECTED OR APPOINTED TO HOLD AN OFFICE IN ANY BUSINESS, SOCIAL, FRATERNAL CLUB, OR ON ANY BOARD OF DIRECTORS OR TRUSTEES? If so, to what office, where and when?

No

36. ARE YOU RENTING OR BUYING YOUR PRESENT RESIDENCE? Buying

37. WHAT HOBBIES OR SPECIAL INTERESTS DO YOU HAVE NOW, OR HAVE YOU HAD IN THE PAST?
House PAINTER
PART Time

38. WHAT IS YOUR PRIMARY SOURCE OF NEWS INFORMATION?

NEWSPAPER ✓ T. V. ✓ RADIO ✓ OTHER ____

39. WHAT NEWSPAPERS DO YOU READ AND HOW MANY TIMES PER WEEK WITH EACH ONE?
Rome News Daily

40. ARE THE PEOPLE YOU USUALLY RUN INTO IN YOUR NEIGHBORHOOD:

All White ____ All Black ____
Both Black and White ✓

41. THE DEFENDANT, TIMOTHY TYRONE FOSTER, IS A MEMBER OF THE NEGRO RACE. THE VICTIM, QUEEN MARIE WHITE, WAS A WHITE CAUCASIAN. WILL THESE FACTS PREJUDICE YOU AGAINST TIMOTHY TYRONE FOSTER OR AFFECT YOUR ABILITY TO RENDER A FAIR AND IMPARTIAL VERDICT BASED SOLELY UPON THE EVIDENCE?

YES ____ NO ✓

42. IF YOU ARE SELECTED TO SERVE AS A MEMBER OF THIS JURY, YOU AND OTHER JURORS WILL BE SEQUESTERED; THAT IS, YOU WILL BE STAYING IN A MOTEL APART UNTO YOURSELVES WHEN NOT ATTENDING THE TRIAL ITSELF. WOULD BEING ON SUCH A JURY CAUSE YOU ANY UNDUE HARDSHIP OR DIFFICULTIES? IF SO, PLEASE EXPLAIN.
I work part time as a house painter, I have work that need to Complete

43. DO YOU HAVE ANY HEALTH PROBLEMS THAT MIGHT CAUSE YOU ANY DIFFICULTY OR HARDSHIP IF YOU WERE SELECTED AS A JUROR IN THIS CASE? IF YES, PLEASE EXPLAIN.
No

44. DO YOU HAVE ANY PERSONAL, FAMILY OR BUSINESS PROBLEMS THAT WOULD CAUSE YOU DIFFICULTY OR HARDSHIP IF YOU WERE SELECTED AS A JUROR IN THIS CASE? IF YES, PLEASE EXPLAIN.
I have Several [illegible] Bills [illegible] Home painting Jobs

Eddie Wood — 4-20-87
JUROR, PLEASE SIGN FULL NAME HERE — DATE SIGNED

JUROR NUMBER: 94

State v Foster 86-F-2218-2
87/103

THE FOLLOWING LIST OF QUESTIONS HAVE BEEN PROPOUNDED BY THE COURT TO FACILITATE THE JURY SELECTION PROCESS. THE QUESTIONS ARE NOT INTENDED TO PRY INTO YOUR PRIVATE AFFAIRS NOR TO EMBARRASS YOU, BUT TO ASSURE ALL PARTIES THE BEST POSSIBLE JURY FOR THIS CASE.

Excused for medical reasons

NOTE: SHOULD YOU REQUIRE ADDITIONAL SPACE FOR YOUR ANSWERS, ATTACHED HERETO IS A BLANK SHEET OF PAPER FOR YOUR USE. PLEASE INDICATE THE QUESTION NUMBER IN WHICH YOU ARE ANSWERING. THERE IS NO NEED TO WRITE THE QUESTION IF YOU WILL INDICATE THE QUESTION NUMBER ONLY.

1. NAME: Edgar L Brand Sr

2. ADDRESS: 114 Perkins St city
What area of Floyd County?
North [X] South [ ] East [ ] West [ ]

3. PLACE OF BIRTH: Tilda Ohio

4. DATE OF BIRTH: 1926 RACE color

5. LENGTH OF TIME IN FLOYD COUNTY: _____

6. PARENTS: FATHER'S NAME James Brand Sr
Living [ ] Deceased [X]

If living, where _____

Place of Birth Rome, Ga

MOTHER'S NAME Ruth Brand
Living [ ] Deceased [X]

If living, where _____

Place of Birth Rome, Ga

7. HAVE YOU LIVED AT ANY OTHER ADDRESS DURING THE LAST TEN (10) YEARS? YES [ ] NO [X]
IF YES, WHAT ADDRESS(ES)?

(A) _____

Date: _____

(B) _____

Date: _____

(C) _____

Date: _____

8. PLEASE STATE THE SCHOOLS WHICH YOU HAVE ATTENDED:

(A) GRADE SCHOOL Rome, Ga DATE _____

(B) JUNIOR HIGH _____ DATE _____

(C) HIGH SCHOOL Ga Dnst in WW II DATE 1942

(D) COLLEGE _____ DATE _____

Q. 41 Asked & Ans. on P 4

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(E) GRADUATE SCHOOL _____ DATE _____

(F) VOCATIONAL OR TECHNICAL SCHOOLS

_____ DATE _____

DEGREE, CERTIFICATE, DIPLOMAS HELD

_____ DATE _____

(G) PROFESSIONAL SCHOOL _____ DATE _____

9. OCCUPATION: (Please be definite. If you are self-employed, state what your business is; if you are employed, state your employer; if you are a teacher, state what grade or subjects and at what school; if you are in civil service, state what you do and where; if you are in the Armed Forces, state your rank and branch; if you are retired, please explain your principle employment before you retired.)

North West Davis Region Hospital State

10. WHAT IS YOUR POSITION, AND WHAT ARE YOUR DUTIES IN THAT POSITION? Nurse Nursing Department

11. HOW LONG HAVE YOU BEEN WITH THE SAME EMPLOYER? 18 Yrs

12. FOR WHOM ELSE HAVE YOU WORKED IN THE PAST TEN YEARS?

(A) _____ DATES _____

(B) _____ DATES _____

(C) _____ DATES _____

13. HAVE YOU EVER BEEN IN MILITARY SERVICE? Yes

WHAT BRANCH? WAVE DATES 1942

14. MARITAL STATUS: Married Yes Separated _____

Single _____ Divorced _____ Other _____

If Married, how many years? 27

15. SPOUSE'S NAME Land Mac Board

16. SPOUSE'S OCCUPATION (Follow the same instructions as to your own occupation in Question Number 9 above):

Chemical Sales on Third Ave city

15 Yrs

17. SPOUSE'S EDUCATION LEVEL: Diplomas Main High

18. YOUR RELIGIOUS AFFILIATION: Baptist

19. HOW OFTEN DO YOU ATTEND CHURCH? Ever Sunday Mostly

36. ARE YOU RENTING OR BUYING YOUR PRESENT RESIDENCE? _____

37. WHAT HOBBIES OR SPECIAL INTERESTS DO YOU HAVE NOW, OR HAVE YOU HAD IN THE PAST?

_____

_____

38. WHAT IS YOUR PRIMARY SOURCE OF NEWS INFORMATION?

NEWSPAPER ✓ T. V. ✓ RADIO ✓ OTHER _____

39. WHAT NEWSPAPERS DO YOU READ AND HOW MANY TIMES PER WEEK WITH EACH ONE?

_____

_____

40. ARE THE PEOPLE YOU USUALLY RUN INTO IN YOUR NEIGHBORHOOD:

All White _____ All Black _____
Both Black and White ✓

41. THE DEFENDANT, TIMOTHY TYRONE FOSTER, IS A MEMBER OF THE NEGRO RACE. THE VICTIM, QUEEN MADGE WHITE, WAS A WHITE CAUCASIAN. WILL THESE FACTS PREJUDICE YOU AGAINST TIMOTHY TYRONE FOSTER OR AFFECT YOUR ABILITY TO RENDER A FAIR AND IMPARTIAL VERDICT BASED SOLELY UPON THE EVIDENCE?

YES ✓ NO _____

42. IF YOU ARE SELECTED TO SERVE AS A MEMBER OF THIS JURY, YOU AND OTHER JURORS WILL BE SEQUESTERED; THAT IS, YOU WILL BE STAYING IN A MOTEL APART UNTO YOURSELVES WHEN NOT ATTENDING THE TRIAL ITSELF. WOULD BEING ON SUCH A JURY CAUSE YOU ANY UNDUE HARDSHIP OR DIFFICULTIES? IF SO, PLEASE EXPLAIN.

_____

_____

43. DO YOU HAVE ANY HEALTH PROBLEMS THAT MIGHT CAUSE YOU ANY DIFFICULTY OR HARDSHIP IF YOU WERE SELECTED AS A JUROR IN THIS CASE? IF YES, PLEASE EXPLAIN.

_____

44. DO YOU HAVE ANY PERSONAL, FAMILY OR BUSINESS PROBLEMS THAT WOULD CAUSE YOU DIFFICULTY OR HARDSHIP IF YOU WERE SELECTED AS A JUROR IN THIS CASE? IF YES, PLEASE EXPLAIN.

No

Edgar Lee Brandon 4-20-87

JUROR, PLEASE SIGN FULL NAME HERE — DATE SIGNED

JUROR NUMBER: 102

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90/103

THE FOLLOWING LIST OF QUESTIONS HAVE BEEN PROPOUNDED BY THE COURT TO FACILITATE THE JURY SELECTION PROCESS. THE QUESTIONS ARE NOT INTENDED TO PRY INTO YOUR PRIVATE AFFAIRS NOR TO EMBARRASS YOU, BUT TO ASSURE ALL PARTIES THE BEST POSSIBLE JURY FOR THIS CASE.

NOTE: SHOULD YOU REQUIRE ADDITIONAL SPACE FOR YOUR ANSWERS, ATTACHED HERETO IS A BLANK SHEET OF PAPER FOR YOUR USE. PLEASE INDICATE THE QUESTION NUMBER IN WHICH YOU ARE ANSWERING. THERE IS NO NEED TO WRITE THE QUESTION IF YOU WILL INDICATE THE QUESTION NUMBER ONLY.

1. NAME: Darlene Graham

2. ADDRESS: Rt 6 Hasty Rd 87-C
What area of Floyd County?
North [X] South [] East [] West []

3. PLACE OF BIRTH: Memphis TN. (Shelby)

4. DATE OF BIRTH: 6-25-58 RACE Negro

5. LENGTH OF TIME IN FLOYD COUNTY: 14 yrs

6. PARENTS: FATHER'S NAME Walter A. Harrell
Living [X] Deceased []
If living, where Memphis TN
Place of Birth Memphis TN
MOTHER'S NAME Annie Harrell
Living [X] Deceased []
If living, where 111 Jackson St. Rome
Place of Birth Rome

7. HAVE YOU LIVED AT ANY OTHER ADDRESS DURING THE LAST TEN (10) YEARS? YES [X] NO []
IF YES, WHAT ADDRESS(ES)?
(A) 117 A Smith St Rome
Date: June 78 - 80
(B) _____
Date: _____
(C) _____
Date: _____

8. PLEASE STATE THE SCHOOLS WHICH YOU HAVE ATTENDED:
(A) GRADE SCHOOL Lester / Hollywood DATE -70
(B) JUNIOR HIGH Cypress DATE 70-72
(C) HIGH SCHOOL Pepperell DATE 72-75
(D) COLLEGE Floyd Junior DATE 75-78

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(E) GRADUATE SCHOOL _____ DATE _____

(F) VOCATIONAL OR TECHNICAL SCHOOLS

_____ DATE _____

DEGREE, CERTIFICATE, DIPLOMAS HELD

_____ DATE _____

(G) PROFESSIONAL SCHOOL _____ DATE _____

9. OCCUPATION: (Please be definite. If you are self-employed, state what your business is; if you are employed, state your employer; if you are a teacher, state what grade or subjects and at what school; if you are in civil service, state what you do and where; if you are in the Armed Forces, state your rank and branch; if you are retired, please explain your principle employment before you retired.)

See Sheet #3 Attached

Radio Operator for State Patrol

10. WHAT IS YOUR POSITION, AND WHAT ARE YOUR DUTIES IN THAT POSITION? R/O maintain radio and other duties: paperwork needed.

11. HOW LONG HAVE YOU BEEN WITH THE SAME EMPLOYER? 1 WK.

12. FOR WHOM ELSE HAVE YOU WORKED IN THE PAST TEN YEARS?

(A) K-mart DATES 75-87

(B) _____ DATES _____

(C) _____ DATES _____

13. HAVE YOU EVER BEEN IN MILITARY SERVICE? NO

WHAT BRANCH? _____ DATES _____

14. MARITAL STATUS: Married ✓ Separated _____

Single _____ Divorced _____ Other _____

If Married, how many years? 8

15. SPOUSE'S NAME John

16. SPOUSE'S OCCUPATION (Follow the same instructions as to your own occupation in Question Number 9 above):

Labor / Prodatis Cons.

17. SPOUSE'S EDUCATION LEVEL: High School

18. YOUR RELIGIOUS AFFILIATION: Baptist

19. HOW OFTEN DO YOU ATTEND CHURCH? Regularly

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JUROR NUMBER: 136

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92/103

20. HOW MANY CHILDREN DO YOU HAVE? 2

Boys: 2 Ages: 8 and 17 mos.

Girls: _____ Ages: _____

21. IF CHILDREN ARE EMPLOYED, PLEASE STATE OCCUPATIONS:

_____

_____

22. HAVE YOU EVER, IN ANY WAY, BEEN INVOLVED IN ANY FORM OR KIND OF LAW ENFORCEMENT WORK INCLUDING, BUT NOT LIMITED TO, SECURITY GUARD, POLICE, SHORE PATROL, MILITARY POLICE, AIR POLICE, SHERIFF, OR DEPUTY SHERIFF, IRS INVESTIGATOR, F.B.I., G.B.I., PRIVATE INVESTIGATOR, PRISON OR JAIL GUARD, ET CETERA? (If so, please state when, where and in what capacity.)

R/O State Patrol / Rome / presently

23. DO YOU HAVE A CLOSE FRIEND OR RELATIVE WHO IS NOW OR HAS EVER BEEN, IN ANY WAY, INVOLVED IN LAW ENFORCEMENT AS MENTIONED ABOVE? (If so, please state who, what relation to you, when, where, and in what capacity.)

bro: Walter Harrell Calhoun PD / City / Frank Kendrick guard State Pen.

24. HAVE YOU EVER BEEN THE VICTIM OF A CRIME OF VIOLENCE? (If so, please state what, where and when.)

NO

25. DO YOU ~~HAVE A CLOSE~~ FRIEND OR RELATIVE WHO HAS BEEN A VICTIM OF A CRIME OF VIOLENCE? (If so, please state what kind of case and when it occurred.)

NO

26. HAVE YOU EVER BEEN A WITNESS IN A CRIMINAL CASE (INCLUDING COURT MARTIAL)? (If so, please state what kind of case, where, and when.)

NO

27. HAVE YOU EVER SERVED ON A GR[redacted]RY? NO
If Yes, please an[redacted]r the fo[redacted]g questions:

DID YOU SERVE IN [redacted] FEDERAL [redacted]? NO

DID YOU SERVE IN [redacted]ERIOR CO[redacted]? NO

DID YOU SERVE AS [redacted]OREPERSON? NO

28. HAVE YOU EVER SERVED ON A JURY IN A CRIMINAL CASE? NO
If Yes, please answer the following questions:

DID YOU SERVE IN THE FEDERAL COURT? NO

DID YOU SERVE IN SUPERIOR COURT? NO

PAGE 3

989

DID YOU SERVE AS FOREPERSON IN EITHER TYPE? NO

WHAT KIND OF CASE? _____

DID YOU REACH A VERDICT? _____

29. HAVE YOU EVER SERVED ON A TRIAL JURY IN A CIVIL OR DOMESTIC CASE? If Yes, please answer the following questions: NO

DID YOU SERVE IN THE FEDERAL COURT? _____

DID YOU SERVE IN SUPERIOR COURT? _____

DID YOU SERVE AS FOREPERSON IN EITHER TYPE? _____

WHAT KIND OF CASE? _____

DID YOU REACH A VERDICT? _____

30. HAVE YOU EVER SERVED ON A COURT MARTIAL? NO
If Yes, please answer the following questions:

WHAT KIND OF CASE? _____

DID YOU REACH A VERDICT? _____

31. HAVE YOU EVER BEEN CONVICTED OF ANY CRIME OTHER THAN MINOR TRAFFIC OFFENSES? (If so, state the offense, date of conviction and the sentence imposed.)

NO

32. DO YOU HAVE A CLOSE FRIEND OR RELATIVE WHO HAS BEEN ACCUSED OR CONVICTED OF A CRIME OF VIOLENCE? (If so, state the offense, the date of conviction, sentence imposed or if the charges were dismissed.)

NO

33. HAVE YOU EVER BEEN ELECTED OR APPOINTED TO PUBLIC OFFICE? If so, to what office, where and when?

NO

34. WITHIN THE LAST FIVE (5) YEARS, HAVE YOU BELONGED TO ANY BUSINESS, SOCIAL, FRATERNAL SERVICE, OR CHARITABLE CLUB?

NO

35. WITHIN THE LAST FIVE (5) YEARS, HAVE YOU BEEN ELECTED OR APPOINTED TO HOLD AN OFFICE IN ANY BUSINESS, SOCIAL, FRATERNAL CLUB, OR ON ANY BOARD OF DIRECTORS OR TRUSTEES? If so, to what office, where and when?

NO

JUROR NUMBER: 136

36. ARE YOU RENTING OR BUYING YOUR PRESENT RESIDENCE? owned by mother-in-law

37. WHAT HOBBIES OR SPECIAL INTERESTS DO YOU HAVE NOW, OR HAVE YOU HAD IN THE PAST? Ceramics / reading

38. WHAT IS YOUR PRIMARY SOURCE OF NEWS INFORMATION?

NEWSPAPER_____ T. V. ✓ RADIO_____ OTHER_____

39. WHAT NEWSPAPERS DO YOU READ AND HOW MANY TIMES PER WEEK WITH EACH ONE?

Rome News / Once

40. ARE THE PEOPLE YOU USUALLY RUN INTO IN YOUR NEIGHBORHOOD:

All White_____ All Black_____
Both Black and White ✓

41. THE DEFENDANT, TIMOTHY TYRONE FOSTER, IS A MEMBER OF THE NEGRO RACE. THE VICTIM, QUEEN MADGE WHITE, WAS A WHITE CAUCASIAN. WILL THESE FACTS PREJUDICE YOU AGAINST TIMOTHY TYRONE FOSTER OR AFFECT YOUR ABILITY TO RENDER A FAIR AND IMPARTIAL VERDICT BASED SOLELY UPON THE EVIDENCE?

YES _____ NO ✓

42. IF YOU ARE SELECTED TO SERVE AS A MEMBER OF THIS JURY, YOU AND OTHER JURORS WILL BE SEQUESTERED; THAT IS, YOU WILL BE STAYING IN A MOTEL APART UNTO YOURSELVES WHEN NOT ATTENDING THE TRIAL ITSELF. WOULD BEING ON SUCH A JURY CAUSE YOU ANY UNDUE HARDSHIP OR DIFFICULTIES? IF SO, PLEASE EXPLAIN.

NO

43. DO YOU HAVE ANY HEALTH PROBLEMS THAT MIGHT CAUSE YOU ANY DIFFICULTY OR HARDSHIP IF YOU WERE SELECTED AS A JUROR IN THIS CASE? IF YES, PLEASE EXPLAIN.

NO

44. DO YOU HAVE ANY PERSONAL, FAMILY OR BUSINESS PROBLEMS THAT WOULD CAUSE YOU DIFFICULTY OR HARDSHIP IF YOU WERE SELECTED AS A JUROR IN THIS CASE? IF YES, PLEASE EXPLAIN.

NO

Darlene Graham
JUROR, PLEASE SIGN FULL NAME HERE

4-24-87
DATE SIGNED

I, Clayton Lundy, assisted Doug Pullen and Steve Lanier in the jury selection of Tim Foster. Before the jury was selected I did a background check on several of the black jurors who have been selected to serve on the jury of the Tim Foster case. The check on the jurors was done before, during and upon picking of the jury for the Tim Foster Case. My evaluation of the jurors are a follows:

SHIRLEY POWELL

Mrs. Powell lives on East 11th Street in a low income area, possibly went to East Rome High School. If so, she probably knows the family of Tim Foster. She has had a warrant taken out on her by Greg Plant and she has taken a warrant for Greg Plant. Both warrants were dismissed due to cross warrant situations, in my opinion, I don't think Ms. Powell would be a good juror for this case due to her age and possible relationships with the family of Tim Foster.

During jury selection it was apparent that Ms. Powell knew the family of Tim Foster and had been associating with the family. I recommend that we do not keep Shirley Powell. But, if it come down to the bottom line we might take a long look at her.

Upon picking of the jury and evaluating all the jurors I find that Ms. Powell would be alright to serve in this case.

EDDIE HOOD

Mr. Hood lives in a middle class neighborhood. I think Mr. Hood works at Georgia Kraft, and has been employeed there for a long period of time. I think he has established himself in the community as being well-known and a good family person. ~~My personal opinion is, he would be a good juror to sit on the Poster Case.~~ A criminal check reveals that his son has a misdemeanor conviction for theft by Taking. In a non death penalty case I feel Mr Hood would be a good juror. However, because of his answers in voir dire

~~During jury selection I found out that Mr. Hood would not be a good juror because of his religious beliefs.~~ And hesitation concerning the imposition of the death penalty, I recommended that he not be selected in this case. Also, Mr. Hood, ~~did not believe~~ in the death penalty. ~~So I do not recommend Mr. Hood.~~

Since this was a death penalty case

During the picking of the jury, I recommend strongly that Mr. Hood not be selected.

EVELYN HARDGE

Ms. Hardge lives on Ross Street in a middle class setting in North Rome. Ms. Hardge lives with her husband who, I think has been sick for several years. Ms. Hardge has one son, who is in college somewhere in Tennessee. Also, Ms. Hardge, belongs to St. Paul AME Church and is very active in the Church. Since Ms. Hardge lives in the North Rome Area she possibly could have heard something about the case.

During the jury selection it was apparent also, that Ms. Hardge due to illness of her husband and her belief against the death penalty. Also, that I believe Ms. Hardge would be easily persuaded and irrational. She also has a son who is approximately the same age as Tim Foster. Also, in her statement she would vote for life instead of the death penalty.

Upon picking of the jury I recommend she not be chosen.

MARY TURNER

Ms. Turner resides in a middle class neighborhood. Ms. Turner works at North West Georgia Regional Hospital. Ms. Turner is basically a good person and provides for her family. But Mrs. Turner's husband has family members with criminal records. Due to the criminal activities of Ms. Turner's husband's family, with which she has to identify with; I don't think in my opinion, she could be a fair juror in this case. Also, Ms.Turner has stated that she is my half-sister but this is not true, my family does not recognize her as a member of our family.

During the jury selection of Ms. Turner, she answered some of the questions on the questionnaire wrong. She denied having any criminal history in her family or husband's family. Also, during jury selection she stated she was my half-sister, and as I stated before this is not true. our family does not recognize her as part of the

Lumley family. My biggest concern was, she never mentioned Otis Turner as having a criminal history or her husband.

Upon picking the jury, I recommend that we do not select this juror.

MARILYN GARRETT

Ms. Garrett lives at 306 East 18th Street, which is a low to middle income range. She lives in a possible duplex apartment. Mrs. Garrett comes from a neighborhood called Morton Bend, a community near Coosa, Georgia. The community is possibly all related. Ms. Garrett works possibly two jobs. One job, is at Pepperell and the other is at Headstart. Ms. Garrett deals everyday with low income parents and children that live in the projects close to where Tim Foster lived. I advised Melanie to be very careful in picking Ms. Garrett for a juror in this case due to the case we have on Angela Garrett who lost a teaching and coaching job due to a drug violation. ~~If it comes down to having to pick one of the black jurors, Ms. Garrett, might be okay.~~ This is solely my opinion.

During jury selection I observed Ms. Garrett, that she was nervous and short with her answers. I was shocked when Ms. Garrett said that she was not familiar with the North Rome area when she worked in this area, possibly two to three blocks away from the area where Mrs. White was killed.

I still in my mind want to say no to Ms. Garrett, the relationship with Anglea Garrett whom we have warrants on for Violation of Georgia Controlled Substance Act.

~~Upon picking of the jury after listening to all of the jurors we had to pick, if we had to pick a black juror I recommend that Ms. Garrett be one of the jurors; with a big doubt still remaining.~~

LUCILLE TAYLOR

Ms. Taylor lives in a low to low-middle class neighborhood. I personally do not know Ms. Taylor, but I knew her husband. Ms. Taylor's husband had been

arrested for several different violations concerning alcohol. Ms. Taylor's husband ran a beer tavern and cooked barbeque on the side. Ms. Taylor's family are good people. Due to age of Ms. Taylor, if her health is good, she would be a good juror but also consider her husband's criminal history.

During jury selection Ms. Taylor was excused for cause.

EDGAR BRAND

Mr. Brand lives at 114 Perkins Street. He lives in a middle class setting. Mr. Brand is retired from North West Regional Hospital. Mr. Brand has a son by the name of Edgar Brand wholives with him and has been charged with Theft by Shoplifting. His son plead guilty and received a sentence of 12 months probation and $250 fine. I have a question in my mind whether Mr. Brand would be a fair juror on this case.

During jury selection he was excused for medical reasons.

BOBBIE JEAN JOHNSON

She lives in a middle class neighborhood and is well-liked. My personal opinion, she will be a good juror. I don't know very much about this lady. But because of her age, I think, she would be a good juror to keep.

During jury selection, this juror did not make a appearance.

LOUISE WILSON

Ms. Wilson lives in a middle class neighborhood before her health got bad. Mrs. Wilson belongs to the Metropolitan, a United Methodist Church, and is very active in the Church. I do not know very much about Ms. Wilson. In my opinion, Ms. Wilson, would be a good juror because she can identify with Mrs. White, who lived alone. They both are associated and very active in the church.

During jury selection she was excused for cause.

CORRIE HINES

Mr. Hines lives in a middle class neighborhood. I think Mr. Hines is retired

from either Ga. Kraft or GE. Mr. Hines lives in the same neighborhood with the Foster's. He possibly could know Tim Foster's father. Mr. Hines could possibly know more about this case because the neighborhood he lives in is where this happened. No more than two or three blocks away. In my opinion, Mr. Hines, would not vote for the death penalty because Tim Foster is black. Mr. Hines has a son that has been charged on two different occassions for Forgery and Criminal Damage to Property. His son is possibly the age of 20 to 28 years old. Do not let the other side sneak Mr. Hines in on us. Be very careful of picking Mr. Hines to serve on this jury.

During jury selection he was excused for cause.

JURORS

Juror #				
002		Bonnie Harper		WF
004		Wiley K. Radcliff		WM
005	N	MARY HACKETH	N	WF
009	N	Eddie Hood	N	BM
010		Joyce Nicholson		WF
018		Patricia BING		WF
020		MYRTLE EVANS		WF
022	N	Evelyn HARDGE	N	BF
023		Ann Coultas		WF
024	N	LoElla Hobgood	N	WF
025		VICTOR DeDeurwaerder		WM
029		Ray Allen Tate		WM
031		Billy Graves		WM
033		James T. Cochran		WM
037		Dorsey Hill		WM
038	N	MARY TURNER	N	BF
039		Charles Haulk		WM
044		Donald H. Hall		WM
045	N	George McMAHON	N	WM
046		Claiborne LEROY		WM
048		Salena Hammond		WF
054	N	Anne Joe Gale	N	WF
064		Elbert Roberson		WM
067	N	~~Shirley Powell~~	N	~~Wang~~ cadle BF
069		John Hoban		WM
070		Stephen Horner		WM
071		Linda Kay Franks		WF
072		Margaret Hilliard		WF
073		Robert Milam		WM
076		Shirley Jackson		WF
081		C.A. Garrett		WM
083		ARLENE BLACKMON		WF

998

086 N	Marilyn H. Garrett N		BF
088	Martha Duncan		WF
092	MARK FLOYD		WM
093	Mildred Hill		WF
099	Hugh Hubbard		WM
~~104~~	~~Pamela Hyde~~	James Bevels	WF
106	Don HuffMAN		WM
107	Les Hatch		WM
108	Roy Hatch		WM
109 N	Bobbie Grindstaff N		WF

ALTERNates

011	Nancy Cadle	WF
013	James Bevels	WM
114	Virginia Berry	WF
115 N	Wm. Jeff HowellN	WM
117	Robert SUMNER	WM
118	Walter S. Fuqua	WM
121 N	Elizabeth HartisN	WF
122	Orvil Taliaferro	WM

ADD ONS

125 Carolyn Smith
133 A.D. BrantoN

999

- Looking for qualified Black jurors to avoid white lynch mob argument
- anticipated "STAR WITNESS" Lena Stubbs was black
- CASE REVERSED CASE
- "cull" not "select" jury
- generally used only those jurors excused on D.P.
- remove people w/ feeling of criminal conviction
- DON'T TAKE SOCIAL WORKERS
- CATHOLICS – LAST NAMES END IN VOWELS
- Avoid Batson claim –

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No. 14-8349

In The
Supreme Court of the United States

TIMOTHY TYRONE FOSTER,

Petitioner,

v.

BRUCE CHATMAN, WARDEN,

Respondent.

On Writ Of Certiorari To The Superior Court Of Butts County, Georgia

BRIEF OF PETITIONER

STEPHEN B. BRIGHT*
PATRICK MULVANEY
PALMER SINGLETON
KATHERINE CHAMBLEE
SOUTHERN CENTER FOR HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, GA 30303
404-688-1202
sbright@schr.org

Counsel for Petitioner

* *Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

CAPITAL CASE
QUESTION PRESENTED

Timothy Tyrone Foster, a black defendant, was charged with killing an elderly white woman, Queen Madge White. The prosecutor struck all four black prospective jurors and argued for a death sentence to "deter other people out there in the projects." At trial and on direct appeal, Georgia's courts denied Foster's claim of race discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986).

During state habeas corpus proceedings, Foster obtained the prosecution's notes from jury selection, which were previously withheld. The notes reveal that the prosecution (1) marked the names of the black prospective jurors with a "B" and highlighted them in green on four copies of the venire list; (2) circled the word "BLACK" next to the "Race" question on five juror questionnaires; (3) identified three black prospective jurors as "B#1," "B#2," and "B#3"; (4) ranked the black prospective jurors against each other in case "it comes down to having to pick one of the black jurors"; and (5) gave explanations for its strikes that were contradicted by its notes. The Georgia courts again declined to find a *Batson* violation.

The question presented is this:

> Did the Georgia courts err in failing to recognize race discrimination under *Batson* in the extraordinary circumstances of this death penalty case?

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ORDERS AND OPINIONS BELOW

The order of the Supreme Court of Georgia denying Foster's application for a certificate of probable cause to appeal from the denial of habeas relief is unreported and appears in the Joint Appendix (J.A.) at 246. The order of the Superior Court of Butts County, Georgia, denying habeas relief is unreported and appears at J.A. 172-245. The decision of the Supreme Court of Georgia affirming Foster's conviction and death sentence on direct appeal, *Foster v. State*, 374 S.E.2d 188 (Ga. 1988), appears at J.A. 145-67. The order of the Superior Court of Floyd County, Georgia, denying Foster's motion for new trial is unreported and appears at J.A. 131-44. The section of the transcript from the Superior Court of Floyd County, Georgia, in which the court denied Foster's pretrial objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), appears at J.A. 36-60.

STATEMENT OF JURISDICTION

The Superior Court of Butts County, Georgia, denied Foster's application for habeas corpus relief on December 9, 2013. J.A. 172-245. The Supreme Court of Georgia denied Foster's application for a certificate of probable cause to appeal on November 3, 2014. J.A. 246. Foster's petition for a writ of certiorari was filed in this Court on January 30, 2015, and granted on May 26, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (2012).

RELEVANT CONSTITUTIONAL PROVISIONS

This case involves the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It also involves the Sixth Amendment to the United States Constitution, which provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. "

STATEMENT OF THE CASE

Timothy Tyrone Foster, an eighteen-year-old African-American, was charged in 1986 with killing Queen Madge White, an elderly white woman, in Rome, Georgia. At Foster's capital trial the following year, the prosecutors used four of their nine peremptory strikes to remove all four black prospective jurors, resulting in an all-white jury to try this racially charged case. They claimed that the strikes were not based on race, asserting eight to twelve "race-neutral" reasons for each. The lead prosecutor later urged the jury to impose a death sentence to "deter other people out there in the projects." T.T. 2505.[1]

[1] "J.A." refers to the Joint Appendix. "T.R." refers to the clerk's record from Foster's 1987 trial. "T.T." refers to the transcript from Foster's 1987 trial. "P.T." with a date in parentheses refers

(Continued on following page)

Ninety percent of the families living in the local housing projects were black.

Despite maintaining that race was "not a factor" in its jury selection strategy, J.A. 41, the prosecution had focused extensively on the race of prospective jurors in preparing for jury selection. Its notes, which Foster obtained years after the trial and presented in state habeas corpus proceedings, include lists in which the black prospective jurors were marked with a "B" and highlighted in green, notations identifying black prospective jurors as "B#1," "B#2," and "B#3," notations that ranked the black prospective jurors against each other in case the prosecution had to accept a black juror, and a strike list in which the five black panelists qualified to serve were the first five names in the "Definite NOs" column, meaning they were slated for definite strikes. Some of the notes directly contradict the prosecution's "race-neutral" explanations for its strikes and its representations to the trial court.

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to the transcript of a pretrial or post-trial hearing on the specified date. "J.Q." refers to a juror questionnaire from Foster's 1987 trial. (The questionnaires comprise two separate volumes of the clerk's record; they appear in order of juror number.) "H.R." refers to the clerk's record from Foster's habeas corpus case. "H.T." refers to the transcript and exhibits from Foster's 2006 habeas corpus hearing.

A. Pretrial Motion Under *Batson*

Foster's defense attorneys expected the prosecution to strike black prospective jurors on the basis of race. Prior to trial, they filed a motion to prevent the practice pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), stating:

> 1. [Foster] is an indigent eighteen year old black person accused of the capital murder of an elderly white lady, and the State is seeking the death penalty.
>
> 2. The District Attorney's office in this County and his staff have over a long period of time excluded members of the black race from being allowed to serve on juries with a black Defendant and a white victim.
>
> 3. It is anticipated that the District Attorney's office will attempt to continue its long pattern of racial discrimination in the exercise of its peremptory challenges.

J.A. 17-18. At a pretrial hearing, the parties and the court agreed to defer the *Batson* motion until after the striking of the jury. P.T. 83-85 (Feb. 5, 1987).

B. Jury Selection

During the week of April 20, 1987, ninety-five prospective jurors were either questioned by the court

or summarily excused.[2] Ten of the ninety-five were black.

The court instructed all of the prospective jurors on the panel to fill out questionnaires, T.T. 20-22, and then conducted individually sequestered voir dire, T.T. 182-1322. It gave both parties the opportunity to question each prospective juror about a broad range of issues, including pretrial publicity, religion, occupation, and mitigation. T.T. 182-1322.

After questioning and challenges for cause, forty-two prospective jurors were designated for the striking of the jury, with the prosecution allotted ten peremptory strikes and the defense twenty, as provided by Georgia law at the time.[3] Five of the forty-two were black. However, on the morning of jury selection, Shirley Powell, one of the five black prospective jurors, was excused for cause and replaced with a white woman. T.T. 1326-29. That left four black prospective jurors: Eddie Hood, Evelyn Hardge, Mary Turner, and Marilyn Garrett. The prosecution

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[2] This number does not include those prospective jurors who did not report or those who were never reached by the trial court because their juror numbers on the venire list were higher than 133 – the number of the final panelist questioned by the trial court. T.T. 1310-22.

[3] *See* Ga. Code. Ann. § 15-12-165 (1985) (current version at § 15-12-165 (LexisNexis through 2014 Reg. Sess.)).

struck all four to obtain an all-white jury. J.A. 22-31, 38-40.[4]

After the striking of the jury, the trial court addressed the defense's *Batson* objection, stating, "Let's take care of the black jurors first." J.A. 37. In response, Stephen Lanier, the district attorney and lead prosecutor, began by explaining that his general approach was to discriminate against women, not black people: "Women have a tendency in a case of this nature where the death penalty is being sought – they have serious reservations, time conflicts or whatever it may be, but that is what I look at when I am trying a death penalty case. " J.A. 42. He later said that "eighty percent" of his strikes were against women and that "three of the four blacks were women." J.A. 57.

Lanier then addressed Eddie Hood, stating: "He was exactly what I was looking for in terms of the age, between forty and fifty, good employment and married. The only thing that I was concerned about, and I will state it for the record. He has an eighteen year old son which is about the same year old as the defendant." J.A. 44. Even though the age of Hood's son was "the only thing" he was concerned about, Lanier gave at least eight more reasons for striking

---

[4] The prosecution used nine of its ten peremptory strikes in striking the jury; it had saved its tenth strike for the final juror in the qualified pool, but she was not reached until the selection of alternates. J.A. 31-32.

Hood, including that Hood had a son with a misdemeanor conviction from five years earlier, J.A. 44-45, he did not make enough eye contact during voir dire, J.A. 46, and he "asked to be off the jury," J.A. 45. Lanier also said Hood might oppose the death penalty because he belonged to the Church of Christ, J.A. 46, although Hood had said he was not opposed to the death penalty and was willing to impose it, T.T. 269-70, 274, 278.[5] The prosecution had not questioned Hood about any of its purported reasons for striking him. T.T. 274-78. Lanier then said, "All I have to do is have a race neutral reason, and all of these reasons that I have given the Court are racially neutral." J.A. 48.

Although Lanier had not yet addressed the other three black prospective jurors, the trial court denied the *Batson* motion and was prepared to move on to other things: "Well, the Court overrules the motion, and finds that Batson has been met." J.A. 49. However, Lanier stated that he wanted to "perfect the record" by giving reasons for the other three strikes. J.A. 49. Referring to his notes at times, he went on to proffer more than thirty reasons for the strikes of

---

[5] Lanier also said that he struck Hood because he had food poisoning during voir dire, J.A. 45-46, his wife worked at Northwest Regional Hospital, J.A. 45, the defense did not ask him enough questions about certain issues, J.A. 47, and his brother was formerly a consultant with law enforcement toward people involved in drugs, J.A. 46.

Evelyn Hardge, Mary Turner, and Marilyn Garrett. J.A. 49-57.

Lanier said that Garrett had the "most potential." J.A. 55. In a brief filed after trial, he made clear that he considered Garrett to have "the most potential to choose from *out of the four remaining blacks* in the 42 panel venire." T.R. 438 (emphasis added). The opportunity to strike Garrett came about, he said, because he had planned to strike another black venire member, Shirley Powell, but she was excused for cause on the morning of jury selection. T.R. 438-39. Lanier said that he would have accepted Garrett "except for this one thing, her association and involvement in Head Start," which "deals with low income, underprivileged children," and "her age being so close to the defendant." J.A. 56. Garrett was thirty-four; Foster was nineteen. J.Q. #86 at 1; T.R. 588. The prosecutors later labeled Garrett a "social worker" with Head Start and said they "wanted to stay away from any social worker." J.A. 103. But Garrett was not a social worker; she was a teacher's aide. J.Q. #86 at 2. Lanier then asserted at least seven other reasons for striking Garrett, including that she was a woman, J.A. 57, she appeared nervous, J.A. 55, and she "didn't ask off" the jury, J.A. 56 (even though one reason asserted for the strike of Hood was that he "asked to be off the jury," J.A. 45).[6] As with Hood, the

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[6] Lanier also said he struck Garrett because she was divorced, J.A. 56; she said "yeah" to the court four times, J.A. 55; the defense did not ask her about certain issues, J.A. 56; and she

(Continued on following page)

prosecution had not asked Garrett about any of these issues in voir dire. T.T. 952-53.

With respect to the strike of Turner, Lanier gave at least twelve reasons, including that Turner was not candid on her questionnaire and in statements to the court. J.A. 51-54. The prosecution had not asked Turner about any of the supposed inaccuracies in her statements. T.T. 595-98. Lanier also stated that Turner was "hostile to the Court and counsel," J.A. 52, and confused and hesitant about certain questions, J.A. 53. As for Hardge, Lanier gave at least nine reasons for striking her, including that she was "confused" and "irrational." J.A. 51. Lanier asserted that all four black prospective jurors were some combination of confused, J.A. 46, incoherent, J.A. 51, hostile, J.A. 52, disrespectful, J.A. 55, and nervous, J.A. 55, and that three of the four did not make sufficient eye contact, J.A. 46, 53, 55. After Lanier stated the reasons for each strike, the trial court promply upheld them and found no *Batson* violation. J.A. 51, 55, 58.

C. Trial

With an all-white jury selected, the prosecution presented its evidence. White, a retired schoolteacher, T.T. 1603, was killed by strangulation, T.T. 2053, during a burglary of her home in which a large air

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indicated that she was not familiar with the victim's neighborhood, but Lanier thought she was, J.A. 55-56.

conditioner and other items were taken, T.T. 1675-98. Foster was arrested after his girlfriend informed the police that he was involved in the crime and had given her several items taken from White's home. T.T. 1710-12. Upon interrogation, Foster gave two statements in which he acknowledged entering the home and participating in the crime. T.T. 1726-71. He was found guilty on all three counts – murder, burglary, and theft by taking. T.T. 2444-45.

The issue of penalty was sharply contested. There were questions about how many people were involved in the crime and the precise role of Foster,[7] who is intellectually limited.[8] The circumstances of Foster's life also weighed against a death sentence. In addition to his intellectual deficits, Foster was young

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[7] Defense counsel stated to the jury, "I think a lot of you find it hard to believe that Tim was there alone." T.T. 2347-48. The prosecution's investigator later testified in the habeas proceedings: "No one can carry an air conditioner as big as he had that he took out that window to get into that lady's house, and carried it home. He couldn't have done it by himself." H.T. 216. The investigator believed that Foster's father was involved in the crime. H.T. 216-17.

[8] Dr. Douglas Laipple, a psychiatrist, testified at trial that Foster was in the borderline range for intellectual disability. T.T. 2232. Subsequent to trial, Foster presented sufficient evidence of intellectual limitations to warrant a separate trial to determine whether he was ineligible for the death penalty under Georgia's law prohibiting the execution of people with intellectual disability. H.R. 132-33. Although Foster had received IQ scores ranging from 58 to 80 throughout his life, the jury found that he failed to meet his burden of proving intellectual disability. *See Foster v. State*, 525 S.E.2d 78, 79 (Ga. 2000).

and the product of parents who introduced him to drugs at an early age and showed little concern for him. T.T. 2185-86, 2234. When defense counsel met with Foster's parents to discuss mitigation and the possibility that Foster could receive a death sentence, Foster's father refused to cooperate, saying he "could always make another child." H.T. 38.

District Attorney Lanier argued at the penalty phase that the jury should impose a death sentence in part to "deter other people out there in the projects." T.T. 2505. At the time, thirty-two of the thirty-four units in the local housing projects were occupied by black families. T.R. 551. The jury sentenced Foster to death. T.T. 2547-51.

D. Post-trial Litigation

After the death sentence was imposed, Foster's counsel renewed their *Batson* objections in a motion for new trial. T.R. 375-421. They also filed a motion for discovery of the prosecution's notes from jury selection. J.A. 61-65. They argued that because "the State use[d] part of its notes to justify its exclusion of black jurors in this case," the notes "should be available to this Court and other Courts which examine[ ] the intent of the State." J.A. 62-63. The trial court denied the motion for discovery. J.A. 66-68.

Lanier filed a response to Foster's motion for new trial asserting even more reasons for his strikes of the black prospective jurors than he asserted at the *Batson* hearing. T.R. 424-45. For example, he claimed

he had struck Marilyn Garrett in part because her cousin had been arrested on drug charges. T.R. 424; J.A. 105. However, he had stated after the death verdict was returned that he did not learn about Garrett's cousin until after jury selection. P.T. 8-9 (May 1, 1987).[9]

At the hearing on Foster's motion for new trial, Lanier stated that he wanted "to voluntarily take the stand" to provide further explanation of his reasons for the strikes, J.A. 78, but he added, "I just would like, if I take the stand, I would like for defense counsel to be put on notice that I don't want him to have access to my file," J.A. 79. After receiving assurances from the trial court that the defense could not gain access to his file, Lanier testified. He reiterated several of his reasons, offered new ones, J.A. 79-113, and stated that he struck Garrett because she was a social worker, J.A. 95, 102-03. The trial court later issued a written order denying the motion for new trial and stating that the prosecution did not violate *Batson*. J.A. 131-44.

Foster appealed his conviction and death sentence to the Georgia Supreme Court, arguing in part that the trial court erred in overruling his *Batson* objection and denying his motion for discovery of the

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[9] Although this separately paginated transcript states the date as April 20, 1987, which was the first day of the trial, it also states that it reflects a "hearing held at the bench after the trial of the case and sentencing phase." The sentencing phase concluded on May 1, 1987. T.T. 2547.

prosecution's notes from jury selection. The Georgia Supreme Court affirmed, holding that the trial court did not err in finding that the strikes were "sufficiently neutral and legitimate." J.A. 152.[10] The court also held that Foster was not entitled to the prosecution's notes. J.A. 152.

E. Habeas Corpus Proceedings

In 1989, Foster filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. H.R. 5-24. The following year, the case was remanded to the Superior Court of Floyd County for a trial on whether Foster was ineligible for the death penalty under Georgia's intellectual disability exclusion. H.R. 132-33. After a Floyd County jury returned a verdict in 1999 finding that Foster did not meet the definition of intellectual disability in the trial court's instructions,[11] the habeas case resumed in Butts County.

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[10] The Georgia Supreme Court upheld the strike of Marilyn Garrett based on two of the reasons asserted – that she was a social worker, and that her cousin had been arrested on drug charges. J.A. 151. But Garrett was not a social worker, J.Q. #86 at 2, and Lanier did not know about her cousin's drug issue until after jury selection, P.T. 8-9 (May 1, 1987).

[11] *See Foster v. State*, 525 S.E.2d 78, 79 (Ga. 2000). During the intellectual disability trial proceedings, which included a pretrial appeal to the Georgia Supreme Court, *Zant v. Foster*, 406 S.E.2d 74 (Ga. 1991), the remainder of Foster's habeas petition was held in abeyance. J.A. 173.

In 2006, Foster's habeas counsel obtained the prosecution's jury selection notes from the 1987 capital trial pursuant to a request under the Georgia Open Records Act.[12] The notes include the following evidence, which Foster presented at a 2006 habeas hearing in support of his *Batson* challenge:

First, the prosecution's file includes four different copies of the venire list of prospective jurors with the names of the black prospective jurors marked with a "B" and highlighted in green. J.A. 253-76.[13] Each of the four lists includes a key in the top-right corner of the first page indicating that "[Green highlighting] Represents Blacks." J.A. 253, 259, 265, 271.[14] The following is the first page of one of the four lists, which shows black prospective jurors (9) Eddie Hood, (15) Louise Wilson, (19) Corrie Hines, (22) Evelyn Hardge, and (28) Bobbie Johnson marked with a "B" and highlighted in green:

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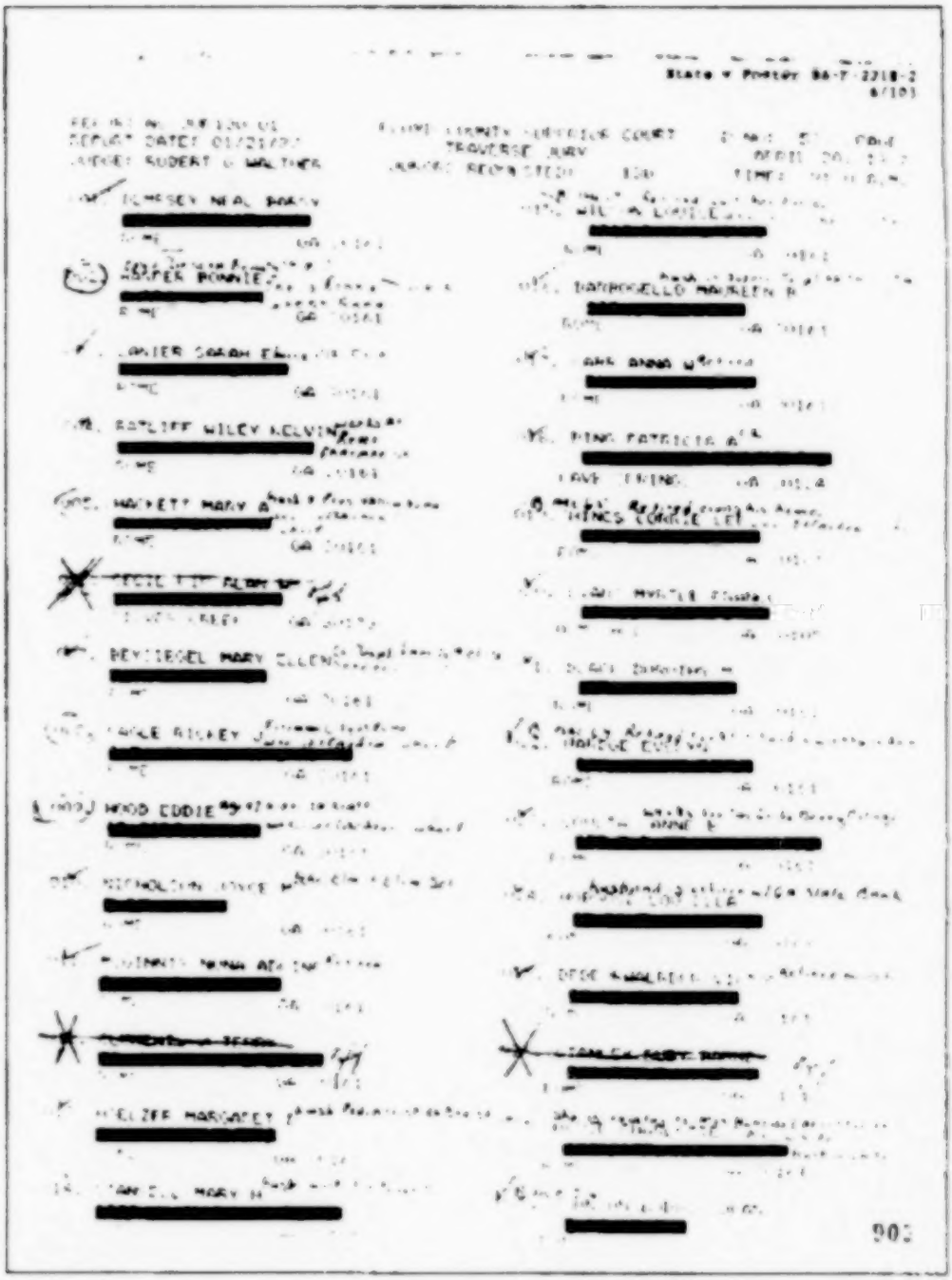
[12] *See* Ga. Code Ann. §§ 50-18-70 to -77 (2002).

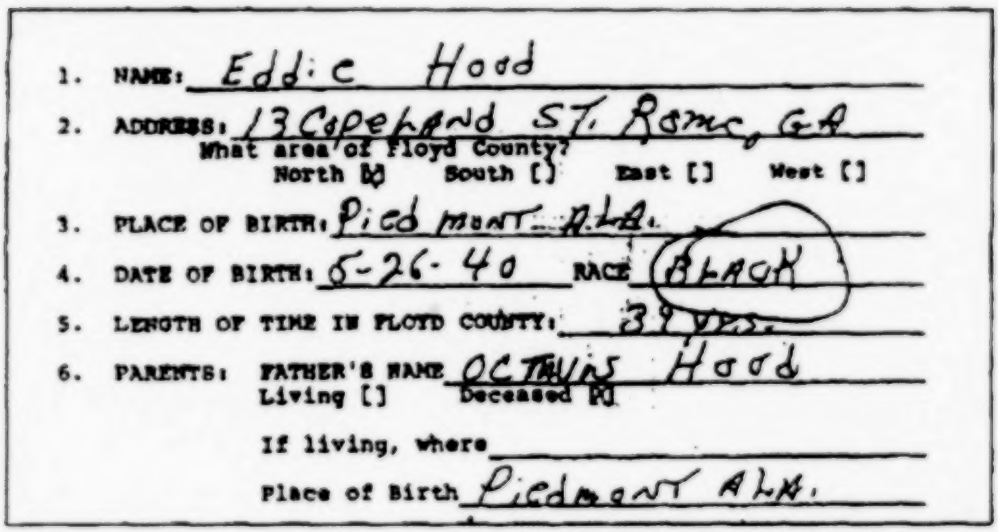
[13] The prosecution's investigator confirmed that the four lists are "four different versions of the same document, that is, they had different handwritten notations on them." H.T. 202. The lists were circulated around the district attorney's office so that various staff members, including "[s]ecretaries, investigators, [and] district attorneys" could make notes on them. H.T. 219; *see also* H.T. 190-91.

[14] The lists also include yellow highlighting for venire members with "prior case" experience. J.A. 253-76.



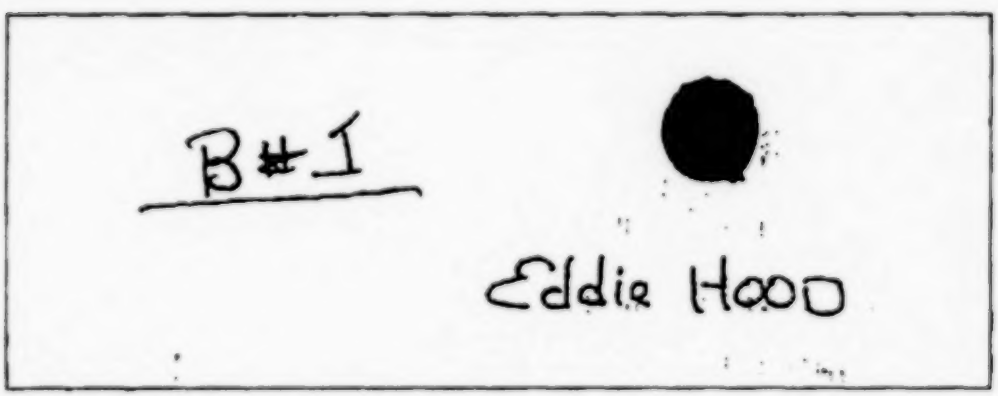
J.A. 253.

Second, the word "BLACK" next to the "Race" question was circled on the juror questionnaires of five black prospective jurors. J.A. 311, 317, 323, 329, 334. For example:


1. NAME: Eddie Hood
2. ADDRESS: 13 Copeland ST. Rome, GA
What area of Floyd County?
North [X] South [ ] East [ ] West [ ]
3. PLACE OF BIRTH: Piedmont Ala.
4. DATE OF BIRTH: 5-26-40 RACE BLACK
5. LENGTH OF TIME IN FLOYD COUNTY: 39 yrs.
6. PARENTS: FATHER'S NAME OCTAVIS Hood
Living [ ] Deceased [X]
If living, where
Place of Birth Piedmont Ala.

J.A. 329.

Third, the prosecution identified black prospective jurors Eddie Hood, Louise Wilson, and Corrie Hines as "B#1," "B#2," and "B#3," respectively, in its notes. J.A. 295-97. For example, Eddie Hood was identified as follows:



J.A. 295.

Fourth, the notes reveal that the prosecution compared the black prospective jurors against each other in case it had to accept one of them. A note about Evelyn Hardge states, "Might be the [b]est one to put on [j]ury." J.A. 294. A draft affidavit from the prosecution's investigator relates his view that "if it comes down to having to pick one of the black jurors, [Marilyn] Garrett, might be okay." J.A. 345.[15]

Fifth, the prosecution's strike lists prioritize the striking of black prospective jurors and contradict the representations made by Lanier to the trial court with regard to his strike of Marilyn Garrett. Lanier claimed in his post-trial pleading that his team "had, in [its] jury notes, listed [Marilyn Garrett] as questionable," T.R. 438, and only decided to strike her after Shirley Powell was excused for cause, T.R. 439. However, Garrett was included on the prosecution's list of "Definite NOs," which was created *before* Powell, who was also on the list, was excused:

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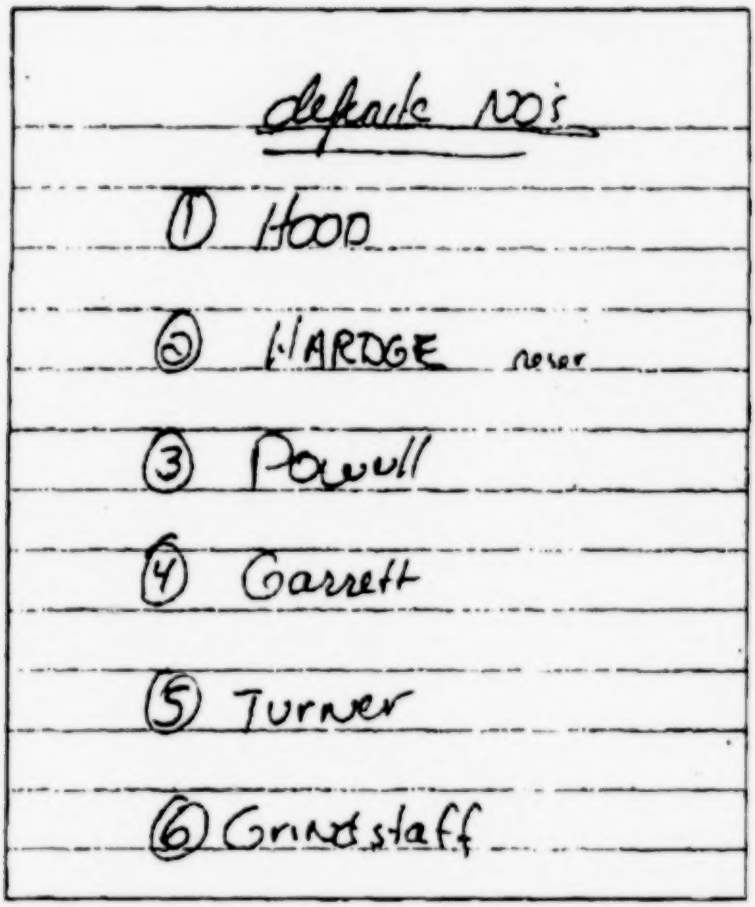
[15] The investigator discussed ten black prospective jurors in his draft affidavit. J.A. 343-47. When District Attorney Lanier submitted the final version of the affidavit to the trial court in response to Foster's motion for new trial, it discussed only three of the ten, and the sentences referring to the race of Garrett and the other black prospective jurors had been deleted. *Compare* J.A. 343-47 (draft affidavit) *with* T.R. 555-57 (affidavit filed with trial court).



J.A. 301. The first five names on the "Definite NOs" list are the five black prospective jurors who were on the panel when the list was made. The same page includes a "Questionables" list including the names of six white prospective jurors from the final pool, four of whom were struck by Lanier. J.A. 301. The lists of "Definite NOs" and "Questionables" correspond precisely to the strikes Lanier ultimately made.[16]

[16] The prosecution struck the four black prospective jurors on the list of "Definite NOs," J.A. 22, 23, 26, 29, and the one white prospective juror on the list, Bobbie Grindstaff, when she was called as a possible alternate, J.A. 33. The prosecution struck George McMahon, who was listed second under "Questionables" but with an arrow pointing to the "Definite

(Continued on following page)

They also are consistent with the three other juror lists from the prosecution's file in which the jurors to be struck were marked "N" for "No." J.A. 287-90, 299-300, 348-49.[17]

In response to Foster's evidence at the habeas hearing, Georgia presented affidavits from Lanier and Douglas Pullen, the other prosecutor. J.A. 168-71. Lanier and Pullen stated that they did not make the marks on the four highlighted venire lists or instruct others to do so, but they did not address the other information from their file. J.A. 168-71.

The state habeas court denied relief. J.A. 192-96. It explained the *Batson* framework and stated that it would "reach[ ] step three again on the basis of the new evidence presented in [the state habeas] proceedings." J.A. 193. It addressed two categories of notes from the prosecution's file: the highlighted copies of

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NOs." J.A. 27, 301. It also struck the prospective jurors listed first (Lou Ella Hobgood), third (Anna Jo Gale), and fifth (Mary Hackett) on the list of "Questionables," J.A. 22, 23, 27, 301, as well as one prospective juror (James Bevels) from its "Alternates" list who was added to the final pool on the morning the jury was struck, J.A. 30, 301.

[17] Georgia objected to the admission of any evidence regarding Foster's *Batson* claim on the ground that the claim had been raised and addressed on direct appeal. H.R. 1156. However, state law permits habeas petitioners to raise issues previously decided where there is new evidence that was not "reasonably available" at the time of the prior proceeding. *Gibson v. Head*, 646 S.E.2d 257, 260 (Ga. 2007). The state habeas court overruled Georgia's objection and admitted a certified copy of the documents described above. H.T. 19-20.

the venire list and two lists of qualified jurors that identified the race of each prospective juror. J.A. 193. With respect to the highlighted lists, the court noted that the lists had been circulated to "10 to 12 different individuals" in the office of the district attorney "to help pick a fair jury, especially given that this was a death penalty case." J.A. 195. The court did not address any of the other lists or notes.

The court expressly relied on the *Batson* rulings from Foster's trial and direct appeal. J.A. 193, 196. It stated that "both the trial court and the Georgia Supreme Court conducted lengthy examinations of [Foster's] initial *Batson* claims and found no error," and the highlighted lists and other material in the file did not "override this previous consideration." J.A. 193. The court concluded, "[Foster's] renewed *Batson* claim is without merit." J.A. 196.[18]

Foster filed an application for a certificate of probable cause to appeal in the Georgia Supreme Court, which was denied on November 3, 2014. J.A. 246. This Court granted certiorari on May 26, 2015,

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[18] Although the state habeas court referenced res judicata because Foster's *Batson* claim had been raised and addressed on direct appeal, it made clear that it was conducting a step three analysis under *Batson* in light of the new evidence and that if Foster had prevailed, he would have overcome any res judicata bar. J.A. 192-96. Thus, the res judicata issue was determined entirely by the constitutional *Batson* analysis.

to evaluate Foster's claim of race discrimination under *Batson*.

SUMMARY OF THE ARGUMENT

The evidence of racial motive by the prosecution in this racially charged capital case is extensive and undeniable. The prosecutor struck all four black citizens who were in the venire from which the jury was selected. The exclusion of these citizens was not the product of "happenstance,"[19] but the result of the prosecution's identification of them as black and its determination to keep them off the jury.

The names of the black citizens were marked with a "B" and highlighted in green on four lists of the entire venire that were circulated among staff members in the prosecution's office. J.A. 253-76; H.T. 190-91, 219. The race of black citizens was circled on the prosecution's juror questionnaires, J.A. 311, 317, 323, 329, 334, and three black citizens were labeled "B#1," "B#2," and "B#3," J.A. 295-97. The black citizens were compared to each other in case "it comes down to having to pick one of the black jurors." J.A. 345.

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[19] *See Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005) (describing the prosecution's disproportionate use of strikes against black prospective jurors and observing that "[h]appenstance is unlikely to produce this disparity") (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003)).

After voir dire and challenges for cause, five black citizens remained in the venire. Their names were the first five of six names on the prosecution's list of "Definite NOs," J.A. 301 – prospective jurors who were definitely to be struck – showing that the prosecution's highest priority was striking black venire members. One of the five, Shirley Powell, was removed for cause shortly before jury selection. T.T. 1326-29. The prosecution struck the remaining four: Eddie Hood, Evelyn Hardge, Mary Turner, and Marilyn Garrett. J.A. 22-31.

In response to Foster's objection pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), the prosecutors piled on eight to twelve reasons for each strike. J.A. 41-57. They even advanced new reasons for the strikes at the hearing on Foster's motion for new trial, which was six months after jury selection and the verdicts in the case. J.A. 79-115. Some of the reasons were incredible; others were contradicted by the record or the prosecution's own notes; and many applied to white prospective jurors the prosecution accepted.[20]

For example, District Attorney Lanier said he struck Marilyn Garrett because she was affiliated with Head Start and "her age being so close to the

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[20] *See Miller-El v. Dretke*, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.").

defendant." J.A. 56. Garrett was thirty-four and Foster was nineteen. J.Q. #86 at 1; T.R. 588. The prosecution accepted eight white prospective jurors who were thirty-five or under, including a white man who was just two years older than Foster and served on the jury. With respect to Head Start, the prosecutors labeled Garrett a "social worker," J.A. 95, and said they "wanted to stay away from any social worker," J.A. 102-03. But Garrett was not a social worker; she was a teacher's aide. J.Q. #86 at 2. The prosecution accepted every white teacher and teacher's aide in the venire.

The prosecutors said their only concern with Eddie Hood, who was identified as "B#1," was that he had an eighteen-year-old son. J.A. 44. However, the final jury included two white jurors who had sons in the same age range, as well as the juror noted above who was two years older than Foster. The prosecutors also said one of Hood's three sons had been convicted of misdemeanor theft – "basically the same thing that this defendant is charged with." J.A. 45. But it was hardly the same charge. Hood's son received a suspended sentence for stealing hubcaps from a car in a mall parking lot five years earlier. T.R. 446. Foster was facing the death penalty for murder and other crimes.

At the motion for new trial hearing, the prosecutors changed their main reason for striking Hood, stating that "the bottom line" for the strike was Hood's affiliation with the Church of Christ. J.A. 110-11. Even though Hood said repeatedly that he was

not opposed to the death penalty and could impose it, T.T. 269-70, 274, 278, Lanier told the trial court at the *Batson* hearing that he struck Hood because the church "definitely takes a stand against the death penalty." J.A. 46. This was contradicted by the prosecution's notes, which said the church "doesn't take a stand on [the] Death Penalty," leaving the issue "for each individual member." J.A. 302. The notes also said: "*NO*. NO *Black* Church." J.A. 302 (emphasis in original). The prosecutors did not ask Hood if he knew whether his church had a position on the death penalty and, if so, whether he followed it. T.T. 274-78. Similarly, they did not ask other black citizens about the reasons they gave for striking them, even though in many instances doing so would have established whether their supposed concerns were valid.[21]

Taken together, the evidence clearly establishes purposeful discrimination by the prosecution in securing an all-white jury that would respond to its plea "to deter other people out there in the projects," T.T. 2505, by imposing a death sentence on Foster, a black youth from the projects, T.T. 2212.

The Georgia habeas court, which issued the decision under review, failed to consider "all relevant

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[21] *See Miller-El v. Dretke*, 545 U.S. at 246 ("'[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'") (quoting *Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000)).

circumstances" as *Batson* requires because it relied upon and deferred to the rulings from Foster's trial and direct appeal proceedings even though those rulings were made without the prosecution's jury lists and notes. J.A. 192-96. Under a proper *Batson* analysis, the totality of the evidence establishes a constitutional violation.

ARGUMENT

THE PROSECUTION, DISPLAYING A "MIND TO DISCRIMINATE," OBTAINED AN ALL-WHITE JURY BY STRIKING BLACK PROSPECTIVE JURORS ON THE BASIS OF RACE.

Because peremptory strikes "constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate,'" *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)), this Court has established a three-step process for addressing claims of race discrimination in this context. The defendant first must make a prima facie showing of discrimination. *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008). If that showing is made, the prosecution must offer race-neutral explanations for the strikes in question. *Id.* at 476-77. Finally, at step three, the court must determine whether the defendant has established purposeful discrimination. *Id.* at 477. At step three, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Id.* at 478. The *Batson* issue in this case hinges on step three –

whether Foster has established purposeful discrimination in light of all relevant circumstances.

I. The Prosecution Exhibited Discriminatory Intent When Evaluating the Prospective Jurors.

The prosecution's venire lists and notes reveal a sharp focus on the race of the prospective jurors and a determination to prevent black citizens from serving on the jury. When combined with the prosecution's total exclusion of black prospective jurors through peremptory strikes, the notes and records establish that the prosecution was motivated by discriminatory intent.

The names of the black prospective jurors were marked with a "B" and highlighted in green on four separate copies of the list of the entire venire. J.A. 253-76.[22] This required using a green highlighter to go through each list as evidenced by the differences in the highlighting on the different copies. The race-coded lists were circulated throughout the entire district attorney's office for the notations of secretaries, investigators, and assistant district attorneys,

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[22] *See Adkins v. Warden*, 710 F.3d 1241, 1256 (11th Cir. 2013) ("[O]ur conclusion that the state struck Mr. Morris for racial reasons is buttressed as well by the fact that the prosecution explicitly noted the race of every black veniremember (and only black veniremembers) on its jury list in preparation for voir dire. . . .").

H.T. 190-91, 219,[23] showing a culture and comfort level with circulating jury lists coded by race throughout the office.[24]

Beyond the highlighted lists, the race of five black prospective jurors was circled on the prosecution's juror questionnaires. J.A. 311, 317, 323, 329, 334. The first three black prospective jurors in the pool – Eddie Hood, Louise Wilson, and Corrie Hines – were marked as "B#1," "B#2," and "B#3," with notes about each. J.A. 295-97.

A separate list contained notes on seven black prospective jurors, J.A. 293-94, and included the notation that Evelyn Hardge "[m]ight be the [b]est one to put on [j]ury," J.A. 294. No white prospective jurors were included on the list. The prosecutor's investigator expressed the view that "[i]f it comes down to having to pick one of the black jurors, Ms. Garrett, might be okay." J.A. 345.

However, the prosecution did not accept any black citizens for jury service. All of the black prospective jurors were on the "Definite NOs" list – the four who were ultimately struck and Shirley Powell,

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[23] The highlighted lists were created prior to voir dire, as reflected by the fact that they included information on prospective jurors who did not report to court as well as prospective jurors who were quickly excused for cause. J.A. 253-76.

[24] *See Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003) (relying on "the culture of the District Attorney's Office" as a factor indicating discrimination).

who was excused for cause on the morning of jury selection. J.A. 301. Moreover, the names of the five black prospective jurors were the first five names on the "Definite NOs" list. Only one white person appeared on the "Definite NOs" list – a woman the prosecutors unsuccessfully challenged for cause because they believed she was "definitely against the death penalty." J.A. 87; T.T. 1152.

Thus, the prosecution's intention was to strike every black prospective juror, and that took priority over any strikes of white prospective jurors.

II. The Prosecution's Purported Reasons for the Strikes of the Black Prospective Jurors Are Not Credible in Light of the Evidence of Discriminatory Intent and the Prosecution's Misrepresentations to the Trial Court.

The prosecutors piled reason upon reason for their strikes of the black venire members, undermining their credibility in the process.[25] They exaggerated

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[25] *See McGlohon v. State*, 492 S.E.2d 715, 717 (Ga. App. 1997) (finding discrimination in jury selection in part because the striking party "proffered a 'laundry list' of reasons for almost every strike"); *see also Smith v. Chrysler Corp.*, 155 F.3d 799, 809 (6th Cir. 1998) (observing in an employment discrimination case that an employer's "strategy of simply tossing out a number of reasons to support its employment action in the hope that one of them will 'stick' could easily backfire" if "'the multiple grounds offered ... are so intertwined, or ... fishy and

(Continued on following page)

facts to make the black panelists seem problematic, gave reasons that also applied to white prospective jurors,[26] and contradicted themselves and their own notes. They asserted two reasons lifted verbatim from a case in which a *Batson* challenge was denied.[27] They even continued to give new reasons after the trial was over.[28] Significantly, they had not asked questions in voir dire about the reasons they later gave for the strikes.[29] Because *Batson* is not "a mere exercise in

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suspicious'" (quoting *Russell v. Acme-Evans Co.*, 51 F.3d 64, 70 (7th Cir. 1995))).

[26] *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (explaining that if a proffered reason for the strike of a black prospective juror applies just as well to a white prospective juror who was accepted, that is evidence of discrimination); *see also Snyder v. Louisiana*, 552 U.S. 472, 483-84 (2008) (comparing a black panelist who was struck with white panelists who were accepted and finding discrimination).

[27] *Compare* T.R. 424 ("[Eddie Hood] avoided eye contact with the prosecutor. As a personal preference, eye contact is highly valued as a jury selection technique."), *with United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987) ("She avoided eye contact with the prosecutor. As a personal preference, eye contact is highly valued as a jury selection technique."); *compare also* T.T. 425 (stating that Marilyn Garrett "appeared to have a low income occupation"), *with Cartlidge*, 808 F.2d at 1071 (stating that a black prospective juror "appeared to have a low income occupation"). *Cartlidge* was decided four months before Foster's trial and was cited by Lanier in the trial court. J.A. 117.

[28] These reasons "reek[] of afterthought." *Miller-El v. Dretke*, 545 U.S. at 246.

[29] *See Miller-El v. Dretke*, 545 U.S. at 246 (recognizing that a prosecutor's failure to ask questions about a purported reason for a strike suggests that the reason is a pretext for discrimination).

thinking up any rational basis"[30] and a "pretextual reason bears on the plausibility of other reasons given,"[31] the prosecutors' stated reasons are not credible in light of the totality of the circumstances.

A. Marilyn Garrett

Marilyn Garrett was a stable, lifelong member of the Floyd County community. She went to grade school and high school in Floyd County in the 1950s and 1960s and was raising her two children there at the time of Foster's 1987 trial. J.Q. #86 at 1, 3. At thirty-four years old, she had two jobs – one in manufacturing, which she had held for nine years, and a second as a teacher's aide, which she had held for three years. J.Q. #86 at 1-2. She attended church every Sunday and sang in the choir. J.Q. #86 at 2, 5. She stated clearly that she was willing to impose the death penalty. T.T. 951.

Lanier represented to the trial court that he had not intended to strike Garrett and decided to strike her only after he learned that he would not need to use a strike on another black prospective juror, Shirley Powell, who was excused for cause on the

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[30] *Miller-El v. Dretke*, 545 U.S. at 252.

[31] *Harris v. Hardy*, 680 F.3d 942, 960 (7th Cir. 2012). As the United States Court of Appeals for the Seventh Circuit observed, "The implausibility of [one] rationale is reinforced by the pretextual significance of the other justifications offered for the strike[.]" *Id.* at 958.

morning the jury was struck. T.R. 438-39. The prosecution's notes reveal that this was not true. Although the prosecution's investigator thought that if it came down to accepting a black juror, Garrett "might be okay,"[32] Garrett was listed as a "Definite NO," J.A. 301, and was marked with an "N" for "N[o]" on all three of the prosecution's other strike lists, J.A. 287-90, 299-300, 348-49. All four lists were made before Powell was excused and correspond precisely to the strikes Lanier ultimately made.[33]

Lanier also provided an elaborate explanation of his purported thought process following the excusal of Powell, none of which was true. He stated initially that Garrett had the "most potential," J.A. 55, later clarifying in his response to Foster's motion for new trial that he meant "the most potential to choose from out of the four remaining blacks in the 42 panel venire," T.R. 438. He claimed that "the State had to choose between [white prospective] Juror [Arlene] Blackmon or Juror Garrett, the only two questionable jurors the State had left on the list." T.R. 439. He then went on to compare Garrett and Blackmon. T.R. 439-41. But again, Garrett was on the "Definite NOs" list, not the "Questionables" list. J.A. 301. Moreover,

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[32] J.A. 345. In the final version of the affidavit submitted to the trial court, this statement and another statement about Garrett's strength as a prospective juror relative to other black prospective jurors had been deleted. T.R. 556.

[33] *See supra* note 16 (explaining that the lists correspond with Lanier's strikes).

the "Questionables" list makes clear that the prosecution's final decisions were between Blackmon and two other white prospective jurors.[34] The final decisions had nothing to do with Garrett.

Lanier said that he would have accepted Garrett "except for this one thing, her association and involvement in Head Start," which "deals with low income, underprivileged children," and "her age being so close to the defendant." J.A. 56.[35] Garrett was thirty-four and Foster was nineteen. J.Q. #86 at 1; T.R. 588.[36] Lanier accepted eight white prospective jurors who were thirty-five or under, two of whom served on the jury.[37] Don Huffman, one of the two who served, was twenty-one – just two years older than

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[34] The "Questionables" list states: "Hatch or Blackmon" and "Hackett Blackmon." J.A. 301. The prosecution ultimately struck Hackett, J.A. 22, and accepted Blackmon and Hatch, J.A. 29, 31.

[35] When Lanier said this was the "one thing" that kept him from accepting Garrett, he had already given six other reasons for striking her. J.A. 55-56.

[36] *See Adkins v. Warden*, 710 F.3d 1241, 1257 (11th Cir. 2013) (finding the prosecutor's age explanation pretextual where the struck jurors were not actually close in age to the defendant).

[37] *See* J.Q. #4 at 1 (Ratliff, 24); J.Q. #10 at 1 (Nicholson, 35); J.Q. #23 at 1 (Coultas, 36); J.Q. #48 at 1 (Hammond, 26); J.Q. #70 at 1 (Horner, 32); J.Q. #71 at 1 (Fincher, 34); J.Q. #92 at 1 (Floyd, 21); J.Q. #106 at 1 (Huffman, 21). Nicholson, 35, and Huffman, 21, served on the jury. J.A. 34-35. The others were struck by defense counsel.

Foster and thirteen years younger than Garrett. J.Q. #106 at 1.

With respect to her involvement with underprivileged children, Garrett worked with Head Start as a teacher's aide. J.Q. #86 at 2. Lanier claimed to want jurors who were "teachers [and] those associated with teachers" because the victim was a retired school teacher. T.R. 427. Accordingly, he accepted every white teacher and teacher's aide in the qualified pool, all of whom were women, without asking them any questions about the children with whom they worked.[38]

Garrett, a teacher's aide, had the same job in the same school district as Martha Duncan, a white juror Lanier said he accepted *because* she was a teacher's aide. T.R. 430. The questionnaires of Garrett and Duncan are practically identical:

Garrett

[Occupation]: Rome City Schools Head Start – Teachers aide

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[38] *See* J.Q. #10 at 2 (Nicholson); J.Q. #18 at 2 (Bing); J.Q. #88 at 2 (Duncan); J.Q. #114 at 2 (Berry); *see also* T.T. 288-91 (prosecution's voir dire of Nicholson); T.T. 335-40 (prosecution's voir dire of Bing); T.T. 961-63 (prosecution's voir dire of Duncan); T.T. 1346-47 (prosecution's voir dire of Berry). Nicholson, Bing, and Duncan served on the jury. J.A. 34-35. Berry was in the alternate pool and was struck by the defense. J.A. 33.

> [Position and duties]: Teachers Aide – help teacher as needed with 20 children

J.Q. #86 at 2.

> *Duncan*
>
> [Occupation]: teacher's Aide – North Heights [a Rome City School] Kindergarden [sic]
>
> [Position and duties]: teacher's Aide. I help the teacher with the children.

J.Q. #88 at 2. Without any follow-up in voir dire, there was no meaningful way to distinguish between Garrett and Duncan on the basis of their jobs. Yet Garrett was struck, and Duncan served on the jury.[39]

At the motion for new trial hearing, the prosecutors for the first time called Garrett a "social worker," J.A. 95, 102-03, and said that they "wanted to stay away from any social worker," J.A. 103. But Garrett was not a social worker. She was a teacher's aide, just like Duncan.[40] Moreover, Duncan had a son Foster's age – a factor that was supposedly a key reason

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[39] *See Miller-El v. Dretke*, 545 U.S. at 241, 246 (holding that the failure to ask questions and the acceptance of similarly situated white panelists are evidence of pretext and discrimination).

[40] *See Conner v. State*, 327 P.3d 503, 510 (Nev. 2014) ("A race-neutral explanation that is belied by the record is evidence of purposeful discrimination."); *Addison v. State*, 962 N.E.2d 1202, 1215 (Ind. 2012) ("[M]ischaracterization of [a juror's] voir dire testimony is troubling and undermines the State's proffered race-neutral reason for the strike.").

Lanier struck Eddie Hood, J.A. 44, who had been identified as "B#1."

Lanier made it clear that Garrett's affiliation with Head Start and her age were the reasons he struck her – not the many other reasons he gave. J.A. 56. Regardless, the other reasons fall far short of showing that the strike was not the product of discriminatory intent.

Both Garrett and Duncan, the other teacher's aide, answered questions from the trial court by stating that they were not familiar with the neighborhood in North Rome where the victim lived. T.T. 950-51, 959. Lanier said he struck Garrett because he believed she was in fact familiar with the area since she went to high school nearby. Yet he accepted Duncan, who lived in the area. In explaining his strike of Garrett, Lanier said:

> [Garrett] said she was not familiar with the North Rome area, and unfortunately, in her questionnaire, she grew up – she went to Main Elementary or Main School, which is again two blocks from where this crime happened. She said – and yet she drives by the North Rome area every day from Morton Bend Road when she goes to work.

J.A. 55-56. Remarkably, even though Duncan also said that she lacked familiarity with the neighborhood in which the victim lived, T.T. 959, Lanier claimed he accepted her *because* she lived "less than a half mile from the murder scene and [the school at

which she worked was] located less than 250 yards [away]," T.R. 430. Lanier could have asked either juror about their familiarity with the area, but he did not.[41]

Even though Lanier professed that Garrett had good potential and that he would have accepted her but for her job with Head Start, he described her as showing "complete disrespect for the Court" and being "[n]ot a very strong juror." J.A. 55. He said:

> I looked at her, and she would not look at the Court during the voir dire, kept looking at the ground. Her answers were very short, if the Court will recall. Said yeah to the Court on four occasions. Shows a complete disrespect for the Court and its authority. She appeared very shaky, very nervous. Her voice quivered. Not a very strong juror.

J.A. 55. Lanier could not have actually believed those things and still viewed Garrett as a good potential juror whom he almost accepted, as he represented to the trial court. Moreover, Lanier's representation that Garrett said "yeah" to the trial court is contradicted by the transcript, which shows that she answered "yes" to the trial court's questions on three occasions

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[41] If asked, Garrett would have explained – as she did in a post-trial affidavit – that she went to Main High School from 1964 through 1966 because it was the only black school in the county; she was bused there from twenty miles away. T.R. 420.

and did not say "yeah" to the trial court a single time. T.T. 950-52.[42]

The trial court did not make any findings about Garrett's demeanor. J.A. 58, 60, 141-43. As a result, Lanier's assertions are all that support his demeanor-based reasons, and such reasons are susceptible to abuse.[43] This is particularly relevant since Lanier claimed to have problems with the demeanor of all four black prospective jurors, whom he described as "bewildered," J.A. 51, "hostile," J.A. 52, "defensive," J.A. 53, "nervous," J.A. 55, and "impudent," J.A. 55. He also claimed that three of the four – Garrett, Eddie Hood, and Mary Turner – had problems with eye contact. J.A. 46, 53, 55. With Hood, Lanier lifted his explanation verbatim from a reported case, saying that Hood "avoided eye contact with the prosecutor" and that "as a personal preference, eye contact is

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[42] This was not a matter of imprecise transcription. The transcript reflects that numerous white prospective jurors answered "yeah" to questions on voir dire. *See, e.g.*, T.T. 960, 970 (Martha Duncan); T.T. 529, 532 (Billy Graves); T.T. 941, 946 (Arlene Blackmon).

[43] *See, e.g.*, *Harris v. Hardy*, 680 F.3d 942, 965 (7th Cir. 2012) ("Demeanor-based explanations for a strike are particularly susceptible to serving as pretexts for discrimination."); *Brown v. Kelly*, 973 F.2d 116, 121 (2d Cir. 1992) ("[B]ecause such after-the-fact rationalizations are susceptible to abuse, a prosecutor's reason for discharge bottomed on demeanor evidence deserves particularly careful scrutiny."); *United States v. Sherrills*, 929 F.2d 393, 395 (8th Cir. 1991) ("Determining who is and is not attentive requires subjective judgments that are particularly susceptible to the kind of abuse prohibited by *Batson*.").

highly valued as a jury selection technique." T.R. 424.[44]

Lanier also claimed to be concerned that Garrett "didn't ask off" the jury despite her two jobs and two children. J.A. 56. But among the many reasons he gave for striking Eddie Hood ("B#1") was that Hood "asked to be off the jury" because of his other commitments. J.A. 45. The fact that Lanier used both "ask[ing] off" and not "ask[ing] off" as reasons for his strikes of black prospective jurors suggests that the reasons were pretextual.

Adding even more reasons, Lanier mentioned that Garrett was divorced, J.A. 56, but he accepted three of the four white prospective jurors who were divorced.[45] He also said he struck Garrett because defense counsel did not ask her any questions about insanity, J.A. 56, but they did,[46] or alcohol, J.A. 56,

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[44] *See United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987) ("She avoided eye contact with the prosecutor. As a personal preference, eye contact is highly valued as a jury selection technique.").

[45] The final pool of forty-two prospective jurors included four people other than Garrett who were divorced: Anne Coultas, James Cochran, George McMahon, and Leslie Hatch. J.Q. #23 at 2; J.Q. #33 at 2; J.Q. #45 at 2; J.Q. #107 at 2. Lanier struck McMahon, J.A. 27, and accepted the other three, who were struck by the defense, J.A. 23, 24, 31.

[46] Defense counsel asked Garrett, "How do you feel about the use of the insanity defense?" T.T. 955; "[H]ave you ever had any feelings on the insanity defense or thought a lot about it or read anything?" T.T. 955; and "Do you believe in the concept of mental illness?" T.T. 955.

but they did.[47] He added that defense counsel did not ask Garrett many questions about publicity, but they asked her several questions about publicity and learned that she knew little about the case.[48]

Lanier also said he struck Garrett because she was a woman, J.A. 56, asserting that he used "eighty percent" of his strikes on women, J.A. 57.[49] Not including alternates, he used six of his nine strikes on women, J.A. 22-31, but even that number is inflated because three of the seven women he struck were the black women. He struck three white women and two white men, J.A. 22-31 – a disparity that pales in comparison to his pattern of strikes against black people. The final jury included five women. J.A. 34-35.

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[47] The defense asked, "Have you ever known anyone with a drug or alcohol problem?" T.T. 955; "[H]ave you ever consumed alcoholic beverages?" T.T. 956; and "Are you against the use of alcohol now?" T.T. 956.

[48] *See* T.T. 956-57 ("Q: I believe you said that you only read the Sunday paper of the Rome News Tribune, so you haven't read a whole lot about this case, have you? A: No. Q: Have you heard anything on the radio? A: Some. Q: What have you heard on the radio about Tim? A: I heard that he was arrested for the crime. Q: What have you heard about Ms. White on the radio? A: That she was a retired teacher. Q: Have you heard anything in your community about this case? A: No.").

[49] This Court later recognized that "[b]ecause gender and race are overlapping categories, gender can be used as a pretext for racial discrimination." *J.E.B. v. Alabama*, 511 U.S. 127, 145 (1994).

Even after the trial, Lanier continued to pile on additional reasons for his strike of Garrett, asserting that she "appeared to have a low income occupation." T.R. 425. But Garrett worked two jobs, J.Q. #86 at 2, one of which was the same job as white juror Martha Duncan, as explained above. Lanier also stated in the post-trial proceedings that he struck Garrett because she said she did not know anyone with a drug problem even though her cousin had been arrested for drug possession. J.A. 105; T.R. 425. But Lanier had said earlier, after the death verdict was returned, that he did not learn about Garrett's cousin's drug issue until after jury selection.[50]

B. Eddie Hood

Like Marilyn Garrett, Eddie Hood was a long-time resident of Floyd County. He moved there as a child and had lived there for thirty-nine years. J.Q. #9 at 1. He was married with four adult children, and he had worked in the same job in a pulp mill for seventeen years. J.Q. #9 at 2-3. He also worked part-time painting houses. J.Q. #9 at 5.

The prosecution was fixated on Hood's race from the outset, noting a "B" beside his name on the venire

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[50] *See* P.T. 8-9 (May 1, 1987) ("It has come to our attention *since the trial of this case* that Angela Garrett whom the Metro Drug Task Force has just arrested for cocaine, who is a teacher at a school and has been subsequently dismissed from school because of the drug problem.") (emphasis added).

list and highlighting him in green, J.A. 253, 259, 265, 271, identifying him as "B#1," J.A. 295, and circling his race on his juror questionnaire, J.A. 329. It also singled him out in voir dire. The prosecutors encouraged seven of the first eight prospective jurors they questioned to give acceptable answers about pretrial publicity by prefacing their questions with some variation of this statement: "What we are just looking for is what you know so that you can be a fair and impartial juror and base your verdict solely on what you hear in the courtroom." T.T. 190.[51] However, they omitted any such preface for Hood, the only black prospective juror in the first eight. T.T. 274-78. They then questioned Hood aggressively about exposure to pretrial publicity despite his consistent responses that he knew little about the case. T.T. 276-77. This type of differential treatment is evidence of discrimination.[52]

Lanier said that "[t]he only thing that [he] was concerned about" with Hood was that he "has an eighteen year old son which is about the same year old as the defendant." J.A. 44. However, the final jury included two white jurors who had sons close in age

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[51] *See also* T.T. 218-19 (Ratliff); T.T. 244 (Hackett); T.T. 290 (Nicholson); T.T. 314 (Barbogello); T.T. 339 (Bing); T.T. 364 (Evans).

[52] *See Miller-El v. Dretke*, 545 U.S. at 255-56 (recognizing contrasting voir dire questions as evidence of discrimination).

to Foster,[53] as well as Don Huffman, a white juror who himself was just two years older than Foster. J.Q. #106 at 1. When Hood was asked if the defendant's age would be a factor to him in sentencing, he answered, "None whatsoever," T.T. 280, whereas white juror Billy Graves, who had three teenage sons, said "[p]robably so" in response to the same question, T.T. 527. Yet the prosecution struck Hood and accepted Graves, who served on the jury.

Lanier also said that one of Hood's three sons had been convicted of theft – "basically the same thing that this defendant is charged with." J.A. 45. But Hood's son had been given a suspended sentence for stealing hubcaps from a car in a mall parking lot five years earlier, T.R. 446; Foster was charged with murder and other crimes and was facing the death penalty.

By the time of the motion for new trial hearing, Lanier had changed his main reason for striking Hood, declaring that "the bottom line on Eddie Hood is the Church of Christ affiliation." J.A. 110-11. Hood had indicated repeatedly that he could impose the death penalty. T.T. 269, 270, 274, 278. Nevertheless, at the initial *Batson* hearing, Lanier said, "[I]t is my experience that the Church of Christ definitely takes

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[53] Lanier accepted Martha Duncan, the teacher's aide, even though she had sons who were twenty and twenty-five. J.Q. #88 at 3. He also accepted Billy Graves, whose sons were thirteen, fifteen, and seventeen. J.Q. #31 at 3.

a stand against the death penalty." J.A. 46. At the motion for new trial hearing, Lanier said that his knowledge of the church came from Douglas Pullen, the assistant prosecutor. J.A. 101. Pullen stated at the hearing that a lay minister from a "majority black" Church of Christ in Columbus had warned him to be cautious with members of his faith, although he had never said that there was "any tenet of [the Church of Christ] that involved the death penalty." J.A. 114. Pullen also said that in his experience, members of the Church of Christ usually were disqualified because of their opposition to the death penalty. J.A. 114. Hood had expressed no such opposition.

Pullen's representation about the church's position is consistent with the prosecution's notes, which say under the heading "Church of Christ" that the church "doesn't take a stand on [the] Death Penalty" and the issue is "left for each individual member," J.A. 302. But underneath that is written, "*NO*. NO *Black* Church." J.A. 302 (emphasis in original). These notes suggest that the prosecutors did not have a problem with the Church of Christ because it had a position on the death penalty. They had a problem with the Church of Christ because it was a "*Black* Church." J.A. 302.

Of course, the prosecutors could have asked Hood if he knew his church's position on the death penalty and, if so, whether he agreed with it. Their failure to inquire may have been because Hood stated *five times* during voir dire that he was not opposed to the death

penalty and that he could impose it.[54] So instead of questioning Hood about his church and its position, the prosecutors simply asserted that he might be opposed to the death penalty, despite all evidence to the contrary, based on his religious affiliation.[55] At the same time, they accepted Arlene Blackmon, who was Catholic, J.Q. #106 at 2, even though they believed that Catholics would have reservations about imposing the death penalty, J.A. 83-86.

To suggest that his concerns about the Church of Christ were justified, Lanier stated repeatedly that three white prospective jurors who were members of the Church of Christ – Vonda Waters, Gertrude Green, and Thelma Terry – had been struck for cause

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[54] *See* T.T. 269 ("[Court]: Are you opposed to or against the death penalty? A: I am not opposed to it. Q: If the facts and circumstances warrant the death penalty, are you prepared to vote for the death penalty? A: Yes."); T.T. 270 ("[Court]: [A]re you prepared to vote for the death penalty? Now you said yes to that. A: All right. Q: Are you still saying yes? A: Uh-huh."); T.T. 274 ("[Court]: If the evidence warrants the death penalty, could you vote for the death penalty? A: Yes. I could vote for the death penalty."); T.T. 278 ("[Pullen]: And if the facts and circumstances warranted, you could vote to impose the death penalty? A: Yes.").

[55] If the prosecution had asked Hood about his church's view on the death penalty, he would have said the following, as he did in a post-trial affidavit: "To my knowledge, my church does not take a stand against capital punishment. I answered the Court's questions on my views of capital punishment as honestly as I could, and there is nothing in my religious beliefs that would prevent me from giving the death penalty." T.R. 421.

due to their opposition to the death penalty. J.A. 46.[56] This was false. Waters was excused because she was five-and-a-half months pregnant; she was never questioned during voir dire. T.T. 893. Green was excused by joint motion after she said she could vote for the death penalty but could not vote for life imprisonment. T.T. 729-30. Terry was excused because she had already formed an opinion about Foster's guilt. T.T. 557-58.

Lanier also said that Hood "appeared to be confused and slow in responding to questions concerning his views on the death penalty." T.R. 434. However, as previously noted, Hood was unequivocal in his willingness to impose death. He showed some confusion when answering questions about life imprisonment, T.T. 269-74, but his confusion was no different than that shown by many white members of the panel, including Don Huffman, T.T. 1100-01, who served on the jury, J.A. 35. The trial court acknowledged that its death qualification questions were confusing, stating: "I think these questions should be reworded. I haven't had a juror yet that understood

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[56] *See also* T.R. 435 ("Church of Christ affiliates are reluctant to return a verdict of death. This fact is substantiated by Church of Christ jurors Terry (#35), Green (#53) and Waters (#78) being excused for cause due to feeling against the death penalty."); J.A. 114 ("[T]hree out of four jurors who professed to be members of the Church of Christ, went off for Witherspoon or Witherspoon/Witt reasons.").

what that meant." T.T. 994.[57] In its order on the motion for new trial, the trial court reiterated that Hood's "particular confusion about the death penalty questions was not unusual." J.A. 138. In sum, Lanier sought to exploit an ambiguous question that confused virtually all of the jurors to suggest that Hood opposed the death penalty, even though Hood expressed no reservations about imposing it.

Yet another reason offered for the strike of Hood was that he had been hospitalized for food poisoning during voir dire. J.A. 45-46. Because of that, Lanier argued, "I was not sure of his medical – or health capability." J.A. 46. But on the Friday before the jury was struck, the trial court was told that Hood had recovered and was "out painting" a house. T.T. 1303. The court responded: "I believe that would qualify him physically to be here Monday at 9:30. If he can paint a house, he can sit in the jury box." T.T. 1303.[58]

Lanier also expressed concern that Hood's wife worked at Northwest Regional Hospital, where she was a supervisor in food services. J.Q. #9 at 2. Lanier said that the hospital "deals a lot with mentally disturbed, mentally ill people. [T]hey intend [sic] to be more sympathetic and are for the underdog."

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[57] The trial court made other similar comments throughout voir dire. *See, e.g.*, T.T. 1052, 1101-02.

[58] In its order on Foster's motion for new trial, the trial court observed that Hood "seemed well on the day of jury selection." T.R. 568.

J.A. 45. But Lanier expressed no such concern about Arlene Blackmon, a white woman who had worked at the same hospital in food services and housekeeping and served on the jury. J.Q. #83 at 2; T.T. 939. The prosecution asked Blackmon about her work at the hospital in voir dire, T.T. 939,[59] but it did not ask Hood about his wife's work, T.T. 274-79.

Adding more reasons, Lanier said that he struck Hood because "the defense did not ask him a lot of questions," such as questions about insanity, the age of the defendant, and pretrial publicity. J.A. 47. But the defense did ask Hood about those subjects, and Hood gave clear answers.[60] Lanier also said that the defense did not ask Hood about his membership in any social or fraternal organizations. J.A. 47. However, Hood had written on his questionnaire that he did not belong to any social or fraternal organizations,

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[59] *See* T.T. 939 ("[Pullen]: I noticed that you had formerly worked at the Regional Hospital. Do you have any particular training, education or interest in psychiatry, psychology or mental health or anything of that nature? A: No, sir. Q: What did you do when you were at the hospital? A: When I first started there, I was in the kitchen, and after that I was in housekeeping.").

[60] *See* T.T. 280 ("Q: Do you have a feeling about the insanity defense? A: Do I have any opinion about that? I have not formed an opinion on that."); T.T. 280 ("Q: Is age a factor to you in trying to determine whether or not a defendant should receive a life sentence or a death sentence? A: None whatsoever."); T.T. 281 ("Q: Okay. The publicity that you have heard, has that publicity affected your ability to sit as a juror in this case and be fair and impartial to the defendant? A: No, it has no effect on me.").

J.Q. #9 at 4, and, as Lanier must have observed, the defense did not ask *a single prospective juror* about social or fraternal organizations.

Lanier said that it "concerned [him] that [Hood] had a relative who did counsel people involving drugs," because intoxication was "the primary defense in this case." J.A. 46. But Hood, when asked if any member of his family was involved in law enforcement, said, "I have a brother who was involved with the law enforcement some years ago as a – sort of a consultant toward people involved in drugs." T.T. 279. That statement revealed very little about what Hood's brother actually did, and Hood added, "I don't know anything about the nature of his work." T.T. 279.[61]

By Lanier's purported criteria, white venire members Martha Duncan, Arlene Blackmon, and Don Huffman were prime candidates for prosecution strikes. Duncan was a teacher's aide in the Rome City Schools and had a son close in age to Foster. J.Q. #88 at 2-3. Blackmon was Catholic, J.Q. #106 at 2, a religion the prosecutors connected to reservations about the death penalty, J.A. 83-85, 91, and she used

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[61] Lanier also said he struck Hood because Hood "asked to be off the jury." J.A. 45. But as explained in the discussion of Garrett, Lanier said he struck Garrett because she "didn't ask off" the jury. J.A. 56. In addition, Lanier said that Hood made "no eye contact," J.A. 46; this issue is discussed in the section on Garrett since Lanier claimed that Garrett, Hood, and Turner all had problems with eye contact.

to work at Northwest Regional Hospital, J.Q. #83 at 2. And Huffman was just two years older than Foster, J.Q. #106 at 1, and was confused by the death qualification questions, T.T. 1100-01. Yet all three of those prospective jurors were accepted and served, and Garrett and Hood were struck.

Lanier's strikes "correlate with no fact as well as they correlate with race." *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005). Even if some of the stated reasons, "when examined in isolation, appear to have some validity," the totality of the circumstances renders it "obvious that these explanations were merely pretext for the State's exercise of its peremptory strikes for racially discriminatory reasons." *State v. McFadden*, 191 S.W.3d 648, 657 (Mo. 2006).

As this Court has recognized, there is a unique opportunity for racial prejudice to operate in a capital case involving an interracial crime "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing." *Turner v. Murray*, 476 U.S. 28, 35 (1986). After Lanier struck all four black prospective jurors, he urged the jury to impose a death sentence to "deter other people out there in the projects," T.T. 2505, which were ninety percent black, T.R. 551. That argument simply would not have been made if the jury was racially diverse. But Lanier ensured that he would have an all-white jury, and Foster, a black youth from the projects, was sentenced to death.

Race discrimination in the selection of jurors "offends the dignity of persons and the integrity of the courts." *Powers v. Ohio*, 499 U.S. 400, 402 (1991). "A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character." *Id.* at 413-14. In addition, this type of discrimination "casts doubt on the integrity of the judicial process" and places the fairness of a criminal proceeding in doubt. *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). It is not only unconstitutional but unseemly that black citizens who were called to do their civic duty in this case were thoroughly disrespected by the prosecution and reduced to "B"s and "Definite NOs."

III. The State Habeas Court's Decision Is Not Entitled to Deference.

The order of the state habeas court does not warrant deference because it relies upon the rulings of the trial court and the Georgia Supreme Court, J.A. 193, 196, even though neither of those courts had considered the prosecution's venire lists and notes, which made the discrimination in this case abundantly clear. The state habeas court, in conducting its own step three analysis under *Batson*,[62] failed completely to recognize the racial motivations revealed by the prosecution's notes, characterizing them as nothing

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[62] As the court stated, it "reach[ed] step three [of *Batson*] again on the basis of the new evidence." J.A. 193.

more than the "highlighting of the names of black jurors and the notation of their race" in concluding that they did not "override" the prior rulings. J.A. 193. The state habeas court found nothing wrong with circulating race-coded jury lists to "secretaries, investigators and other assistant district attorneys" – "10 to 12 different individuals." J.A. 195. It did not evaluate any of the stated reasons in light of the new evidence. It did not address how the strike lists undermine the prosecutors' credibility. And remarkably, it relied on the affidavit of the prosecution's investigator as evidence of non-discrimination even though the original draft of the affidavit had ranked the black prospective jurors against each other in case "it comes down to having to pick one of the black jurors." J.A. 345.

Because the state habeas court deferred to prior decisions that were based on just a fraction of the evidence that was ultimately presented, it failed to give meaningful consideration to "all relevant circumstances" as *Batson* requires. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting *Batson v. Kentucky*, 476 U.S. 79, 96 (1986)).[63]

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[63] In addition, the rationale for applying the deferential standard of clear error on *Batson* issues is not present in this case. In a typical case, the trial court is best positioned to observe the prosecutors and jurors and evaluate the evidence of discrimination firsthand. *See Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality opinion); *id.* at 372 (O'Connor, J., joined by Scalia, J., concurring in judgment). In this case, however, the habeas court was not involved in the selection of

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Even if granted some level of deference, the state habeas court's decision rejecting Foster's *Batson* claim must be reversed. The evidence of race discrimination in this case is overwhelming, such that this Court should be "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Snyder v. Louisiana*, 552 U.S. 472, 474 (2008) (reversing conviction pursuant to *Batson* under the clear error standard).

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the jury at trial and considered the *Batson* claim nineteen years after trial. *See Holder v. Welborn*, 60 F.3d 383, 388 (7th Cir. 1995) ("[The] rationale given by the Supreme Court for the use of the clearly erroneous standard is inapplicable to the circumstances in this case, where a magistrate conducted the *Batson* hearing more than eight years subsequent to the voir dire proceeding.").

CONCLUSION

For the foregoing reasons, Petitioner Foster respectfully requests that this Court reverse the decision of the Superior Court of Butts County, Georgia.

Respectfully submitted,

STEPHEN B. BRIGHT*
PATRICK MULVANEY
PALMER SINGLETON
KATHERINE CHAMBLEE
SOUTHERN CENTER FOR
HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, GA 30303
404-688-1202
sbright@schr.org

Counsel for Petitioner

* *Counsel of Record*

No. 14-8349

In The
Supreme Court of the United States

TIMOTHY TYRONE FOSTER,

Petitioner,

v.

BRUCE CHATMAN, WARDEN,

Respondent.

On Writ Of Certiorari To The Superior Court Of Butts County, Georgia

BRIEF OF RESPONDENT

SAMUEL S. OLENS
Attorney General
BETH A. BURTON*
Deputy Attorney General
SABRINA D. GRAHAM
Senior Assistant
Attorney General
RICHARD W. TANGUM
Assistant Attorney General

OFFICE OF THE GEORGIA
ATTORNEY GENERAL
40 Capitol Square, SW
Atlanta, Georgia 30334
404-545-3499
bburton@law.ga.gov

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Prior to trial, Petitioner Timothy Foster challenged the array of the jury venire based on race and made it known that he would be mounting a *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge if the State struck *any* black prospective juror. The question presented is:

Did the state habeas corpus court commit clear error in finding that Foster failed to show that the State's strikes were based on purposeful discrimination when the State identified and took notes on black prospective jurors to prepare for those defense challenges?

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INTRODUCTION

The facially neutral notes on black prospective jurors, taken eight months after *Batson v. Kentucky*, 476 U.S. 79 (1986), are not evidence of the State's intention to *engage* in purposeful discrimination as alleged by Foster. Instead, they are the result of the State's efforts to *rebut* contentions of discrimination. When presented with pre-trial challenges to the alleged disparity of black prospective jurors on the array and a pretrial request that the State be required to show that *any* strike of a black prospective juror was not racially motivated, the State had to identify the black prospective jurors and ensure they noted the advantages and disadvantages of placing them as potential jurors. The notes are a reflection of this consideration.

The State's reasons, given both at trial and in sworn testimony in two subsequent proceedings, show that each black prospective juror had characteristics entirely apart from their race that would have put any prosecutor on notice that they may well be inclined against the State's case. Foster's attempted comparisons of white prospective jurors who served on the jury with the black prospective jurors ignore the multi-faceted nature of jury selection. Jurors possess multiple strengths and weaknesses from the perspective of the prosecution. It is the sum of the individual that the State assessed. It is not untoward that a venire member was selected as a juror even though that individual possessed a particular attribute cited by the prosecution as a

reason for exercising a peremptory challenge on another juror.

Although he calls attention to the fact that four black prospective jurors were struck, Foster provides a substantive challenge to only two of them, conceding that a third strike was proper and failing to challenge the fourth in his argument to this Court. Moreover, Foster has not identified a single statement by the prosecution that is itself derogatory of any particular prospective juror. In short, he has failed to show anything but an attempt by a racially diverse prosecution team to demonstrate its compliance with the new evidentiary requirements outlined in *Batson*.

Recognizing this, and that Foster supported his interpretation of the new evidence with only speculation, the state habeas court concluded that Foster had not met his burden of overcoming the Georgia Supreme Court's finding that Foster had failed to prove the third prong of *Batson*. That factual finding by the state courts must be upheld, for Foster has failed to show clear error.

STATEMENT OF THE CASE

1. In 1986, Queen Madge White, a 79-year-old widow and retired elementary school teacher, lived alone in her long-time residence. The neighborhood in

which White lived had, through the years, declined and seen an influx of crime.[1] During the night, in August of 1986, Petitioner Timothy Foster broke into White's home. He broke her jaw, coated her face with talcum powder, sexually molested her with a salad-dressing bottle, and strangled her to death, all before taking items from her home. A month later, Foster threatened his live-in companion, Lisa Stubbs, who was aware of the crimes against White. She, in turn, reported the crimes to police. Once arrested, Foster confessed and Stubbs, who was also black, became the State's main witness against Foster. Foster was indicted for murder and burglary, and the State sought the death penalty. TR 8-11.

2. Applicable to Foster's case was this Court's new evidentiary formula for raising equal protection challenges to the strikes of black prospective jurors. Until April of 1986, *Swain v. Alabama*, 380 U.S. 202 (1965), was the firmly established precedent on how a defendant could attempt to prove purposeful discrimination by the State in the selection of the jury. It required the defendant to show a pattern, "in case after case," of systematic exclusion of blacks from petit juries. *Batson*, 476 U.S. at 92 (citing *Swain*, 380 U.S. at 223). Prior to *Batson*, therefore, the

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[1] While not a part of the voir dire process, Foster repeatedly references the State's closing argument to "deter other people out there in the projects." T 2505. The housing project area was where White lived and the crime occurred. *See* T 1592, 1628, 1768, 1783.

peremptory challenge was one that was "exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, 380 U.S. at 220. Indeed, in *Swain*, the Court held, "we cannot hold that the Constitution requires an examination of the prosecutor's reason for the exercise of his challenge in any given case." *Id.* at 222.

A fundamental change came in the year prior to Foster's trial. In *Batson*, this Court rejected *Swain*'s evidentiary formulation and directed a new procedure for determining racial discrimination in the selection of the petit jury. *Id.* The Court held that, instead of examining for a pattern of discrimination, the trial court must look only at the current case and the peremptory strike of each prospective juror who was allegedly struck on a discriminatory basis. Thus, *Batson* sharpened the focus solely to the individual strikes of black prospective jurors in Foster's specific case.[2]

3. On December 11, 1986 – four months prior to trial and eight months after this Court's *Batson* decision – the defense filed a "Motion to Preclude the Prosecution from Using Its Peremptory Challenges to Exclude Blacks." JA 17-20.[3] In the motion, Foster

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[2] There was no Georgia law to assist the prosecutors in their implementation of *Batson* as the Georgia Supreme Court's first foray into providing some guidance came two months after Foster's trial. *See Gamble v. State*, 357 S.E.2d 792 (1987).

[3] "JA" refers to the Joint Appendix. "TR" refers to the trial court record from Foster's criminal case. "T" refers to the trial

(Continued on following page)

argued that questionnaires be sent to prospective jurors "so that there can be an accurate determination of the State's motives when or if the State attempts to exclude blacks from this jury." JA 19. Foster's motion further requested that the State be required to show that *any* strike of a black prospective juror was not racially motivated. *Id.* This motion put the State on notice that if *any* black prospective juror was peremptorily struck, the defense would ask the prosecutor to explicitly justify his reasoning for the strike. The prosecutors were therefore attempting to determine how to implement the new requirements of *Batson* and, at the same time, contending with a motion that was imprecise and all-encompassing in its challenge to the prosecutors' potential strikes of black prospective jurors.

Foster also filed a pretrial challenge to the jury array, which alleged that black prospective jurors were underrepresented. TR 199. Five days prior to trial, the court held a hearing on that motion, specifically reviewing the alleged disparity of the black prospective jurors. PTH 4/15/87. The trial court denied the motion; but once voir dire commenced, defense counsel announced they were renewing their challenge to the array of the jurors. T 40. These

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transcript from the criminal case. "HT" refers to the state habeas corpus transcript. "PTH" refers to pretrial hearings, followed by the date of the hearing. "JQ" refers to juror questionnaires in the trial record, which are in sequential order by juror number.

challenges required the prosecutors to identify the black prospective jurors in some manner. Also, both the challenges and *Batson* itself required the prosecutors not only to be thoughtful and non-discriminatory in their consideration of the black prospective jurors, but also to develop and maintain detailed information on those prospective jurors in order to properly defend against any suggestion that decisions regarding their selections were pretextual.[4] With the prosecution on notice of both the *Batson* challenge and the defense's intent to vigorously challenge any strikes of black prospective jurors, voir dire began on Monday, April 20, 1987.

4. Voir dire was completed that Friday. The parties had the weekend to assess the prospective jurors and determine how to allot their peremptory strikes. To assist in their selection, the District Attorney circulated the venire list throughout his office for individuals to make notes about particular prospective jurors whom they knew. The circulated list contained no highlighting,[5] though it had a "B" next

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[4] The same level of attention was not required for other prospective jurors because, at the time of Foster's trial, *Batson* had not been expanded to include additional cognizable classes. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 364 (1991); *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

[5] This is shown by the fact that the sheets, prior to being photocopied, contained notes about individual jurors, which are identical on each page. The highlights were not photocopied, as shown by the differences in the "key" at the top and the differences in the highlights.

to black prospective jurors' names. In addition, the District Attorney's Investigator, Clayton Lundy, who was also black, made detailed notes concerning black prospective jurors whom he knew "off the top of [his] head" and kept specific notes on the prospective jurors' voir dire answers. HT 206, 207. Not surprisingly, in light of the pretrial motions and *Batson* itself, someone in the prosecutors' office noted which prospective jurors were black.

When the jury was selected on Monday, April 27, the prosecutor peremptorily struck ten prospective jurors,[6] four of whom were black, and the defense challenged only three of those four strikes. The State's strike of Evelyn Hardge, who was one of the four black prospective jurors struck, was not challenged by the defense at trial or on appeal. JA 106, 150. The chosen jury consisted of twelve white jurors. As anticipated, the defense made a *Batson* objection.

The trial court found that a prima facie case had been established and directed the prosecutor to explain his strikes of the black prospective jurors. JA 41. The prosecutor gave several reasons for striking each black prospective juror. Eddie Hood attended the Church of Christ, which the prosecutors believed generally opposed capital punishment. JA 46. Hood also had a son the same age as Foster, and who had been previously prosecuted by the same district

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[6] The defense was allotted 20 strikes and the State 10. O.C.G.A. §15-12-165.

attorney's office for a theft charge. JA 44-45. Marilyn Garrett worked with low-income, underprivileged children, had a cousin who was currently being prosecuted by the same district attorney, and was less than candid with the court during voir dire about her family and her knowledge of the crime scene area. JA 55-56. Mary Turner was also deceptive during voir dire about her family members with criminal histories and drug problems, and she worked at the local hospital that treated the mentally ill where Foster had been evaluated for trial. T 2315-17. The trial court found no purposeful discrimination and denied the *Batson* challenge.

5. Foster was convicted of malice murder and burglary, and sentenced to death. He filed a motion for new trial, again raising his *Batson* claim. The District Attorney filed a lengthy written rebuttal and testified under oath at the motion-for-new-trial hearing setting forth race-neutral reasons for the strikes. These reasons closely mirrored those given at the initial *Batson* challenge prior to trial. *Compare* JA 44-57; JA 92, 125; TR 424-44. The trial court examined the State's reasons as to each juror, and considered the "many, many aspects of each venireman." JA 134. The trial court, which had of course observed the voir dire process, held that the prosecutors' strikes were "honest," "sound," and "credible," and did not violate *Batson*. JA 133, 137, 138, 140, 142, 143.

The Georgia Supreme Court affirmed. It reviewed the three juror strikes challenged by Foster

(*see* JA 150) and found that "[t]he prosecutor's explanations were related to the case to be tried, and were clear and reasonably specific." *Id.* The Court concluded that the trial court's finding was not clearly erroneous. *Foster v. State*, 374 S.E.2d 188 (1988). This Court denied certiorari. *Foster v. Georgia*, 490 U.S. 1085, *reh'g denied*, 492 U.S. 928 (1989).

6. Foster then raised his *Batson* claim in his state habeas corpus proceedings in July of 1989.[7] As part of those proceedings (during which Foster asserted more than 40 claims), Foster obtained portions of the district attorney's file, which contained some of the prosecution team's notes from before and during jury selection.[8] The notes show, among other things, that the State identified the black prospective jurors at some point through highlights and circling the race on the venire sheets and juror questionnaires.

The state habeas court held a two-day evidentiary hearing. Although Foster had five years to conduct discovery during those proceedings and took the

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[7] On April 4, 1990, the state habeas court remanded Foster's case to the trial court for a jury trial on the issue of his alleged intellectual disability. Foster's habeas corpus case was held in abeyance pending the intellectual disability trial. A jury concluded he was not intellectually disabled and the Georgia Supreme Court affirmed that finding on January 18, 2000. *Foster v. State*, 25 S.E.2d 78 (2000), *cert. denied*, *Foster v. Georgia*, 531 U.S. 890, *reh'g denied*, 531 U.S. 1045 (2000).

[8] Foster did not establish that these were a complete copy of the district attorney's file or a complete copy of all the notes relevant to jury selection.

affidavit testimony of 46 witnesses and the depositions of five witnesses, Foster's counsel never took depositions of the prosecutors or called them as witnesses to ask them when or why the notes were written. Instead, Foster relied on his deposition of Lundy, the investigator, who testified that he wrote the majority of the notes and identified other handwritten notations as something the prosecution may have used in the case. HT 185-202, 208. Lundy was never questioned as to when the notes were taken.

On December 4, 2013, the habeas court held that the "notes and records submitted by [Foster] fail to demonstrate purposeful discrimination," and that the renewed *Batson* claim was without merit. JA 195-96. The Georgia Supreme Court summarily denied Foster's application for a certificate of probable cause to appeal.

SUMMARY OF THE ARGUMENT

The state habeas court reviewed the new evidence submitted by Foster in the state habeas proceedings in conjunction with the factual findings of the trial court and the holding of the Georgia Supreme Court. Following that review, the habeas court found that Foster had failed to overcome the prior findings that the prosecutors' strikes were not racially discriminatory. That factual finding is not clearly erroneous; Foster's *Batson* claim therefore fails.

Foster urges this Court to revisit the state courts' repeated holdings that he failed to show that the prosecution's race-neutral justifications for its strikes were pretextual. He claims that the new evidence, on its face, establishes purposeful discrimination by the prosecution. Neither argument has merit.

I. An accurate assessment of this new evidence does not establish that the prosecutors were motivated by race to strike prospective jurors. To the contrary, Foster's new evidence is perfectly consistent with conscientious, non-discriminatory prosecutors preparing to rebut a defense challenge to the array of the jury and a pretrial *Batson* challenge to *any* black prospective juror that may be peremptorily struck. Further, although Georgia law provided Foster channels for questioning the prosecutors on the meaning of the new evidence, he did not take advantage of those means, but chose to submit the documents and then base his arguments on conjecture. He therefore relies on unfounded speculation, as shown by looking at the various notes that comprise the new evidence.

a. The notes from the prosecution's file show that, at some juncture, the black prospective jurors' names were highlighted and a "B" placed by the name of each. Additionally, at some point, six black prospective jurors' names were circled on their questionnaires. Responding to the defense's pretrial challenges by identifying the black prospective jurors, as was also done by the defense in requesting a list of prospective jurors identifying the race of each, was not racially discriminatory.

b. There are also notes written by Lundy. They include his personal opinion of individuals, but do not establish racial animosity. Lundy's focus does appear to be on the black prospective jurors; however, that is likely based on his having lived in Floyd County his entire life and the black community being relatively small. The notes, and record as a whole, do not establish that black prospective jurors were singled out. Instead, the record shows that all prospective jurors, both black and white, were investigated by the prosecution team as testified to by both Lundy and the district attorney.

c. Also undermined by the notes is Foster's suggestion that the State was attempting to select an all-white jury. The notes from the prosecution's file support the district attorney's testimony at the motion-for-new-trial hearing that the State was attempting to place a black person on the jury for the State's benefit. The State's main witness against Foster was black and the State wanted to avoid an argument from the defense in closing that the jury was a "white lynch mob." Notes from the district attorney's investigator, expressing his opinion as to which black prospective jurors may be acceptable even in light of their voir dire, corroborate the testimony that the State was actively seeking a black juror.

d. Finally, Foster argues that notes from the prosecution's file show ten strikes were allotted, including strikes for both Powell and Garrett. He failed to show anything else. Although Foster had the means to determine in the state habeas proceedings,

it is unclear as to who made these notes, when they were made, or that the individual prosecutor that made the statements even saw these notes. With the exception of one juror, the notes merely reflect the peremptory strikes of the State. Nothing in the notes indicates the reasoning for the strikes or support Foster's argument that they were pretextual.

e. Speculation aside, the notes largely corroborate the in-court statements and the testimony of the prosecutors as to the basis of their strikes of black prospective jurors. The notes mirror the reasons given for the strikes of the black prospective jurors. So, instead of relating to purposeful discrimination in the selection of the jury, the notes correlate to prosecutors attempting to properly implement the new holding in *Batson* and rebut pretrial challenges to the jury array.

The state habeas court properly concluded that Foster had not carried his burden of establishing that the notes showed the strikes were pretextual or racially motivated and denied relief. Foster's speculative arguments do not establish that the state habeas court's finding was clearly erroneous.

II. Foster's claim that the justifications offered by the prosecution for its strikes were pretextual also fails. The state habeas court credited the trial court's factual finding, relied on by the Georgia Supreme Court, that the State had presented credible, race-neutral reasons for each peremptory strike of each black prospective juror challenged by Foster. And it

found Foster's new evidence did not overcome that conclusion. The voir dire responses, in combination with the State's knowledge of the defense strategies, establish that any prosecutor justifiably would have believed the four black prospective jurors not struck for cause had interests against the State, unrelated to race, and used a peremptory strike to validly remove them from the jury. Foster asserts that the prosecutors acted with racial intent only as to two of those jurors (Hood and Garrett). Yet just as the prosecution had good reason to strike the other two, they also had good (race-neutral) reasons to strike Hood and Garrett.

a. The State was aware that Foster was presenting a theory at trial that he was temporarily insane, under the influence of drugs and alcohol, and had come from a deprived background, all of which led to the murder of White. The State struck jurors it believed would be partial to Foster and this defense. Hood was struck, in part, because he had a son the same age as Foster who had been prosecuted by the district attorney trying Foster's case. Hood also had a wife who worked at the local mental health hospital and a brother who had counseled individuals addicted to drugs. Garrett was struck, in part, because she worked with underprivileged youth in the Head Start Program and had a cousin being prosecuted by the same district attorney trying Foster's case.

Garrett was struck, in part, based on her failure to be truthful during voir dire. Garrett stated that she did not know the area in which the crime occurred. Garrett, however, had gone to school and

worked near the crime scene area. And, while claiming not to know anyone with a drug problem, the State was aware that Garrett's cousin had recently been arrested on drug charges.

b. Foster's argument that there were similarly situated white prospective jurors that were not struck by the State, which showed purposeful discrimination, is unpersuasive, and ignores important differences between the jurors aside from their races. While white prospective juror Graves had a son near the same age as Foster, unlike Hood, Grave's son had not been prosecuted by the same district attorney as Foster. White prospective juror Duncan had a nephew that had been charged with armed robbery; however, she was distinguishable in that it did not appear that she was close to her nephew and the nephew had not been prosecuted by the same district attorney trying Foster's case. These differences are not subtle, and any prosecutor would take them into account.

Nor were there jurors similarly situated to Garrett. There were other white prospective jurors that were teachers or teacher's aides, but Garrett's strike was not based on her position as a teacher's aide. Instead, Garrett was struck in part, because she worked with the Head Start Program. Unlike typical school programs, Head Start specifically provides services for low-income families and underprivileged children. Knowing Foster's strategy at trial to present evidence that he "came from a low income underprivileged, disadvantaged youth," which led to the murder of White, this qualitative difference justified the

strike of Garrett. Foster fails to inform the Court that white prospective juror Lou Ella Hobgood, who also worked at "a home for disadvantaged youth," was also struck, in part, on the same basis. TR 425, 428.

c. The trial court found these reasons to be credible and race-neutral, and concluded that Foster had failed to show purposeful discrimination. On direct appeal, the Georgia Supreme Court, giving proper deference to those fact findings, affirmed. The state habeas court, reviewing both the new evidence and the fact findings of the trial court, concluded Foster could not overcome the Georgia Supreme Court's denial of the *Batson* challenge. That finding – which is based on the court's own fact-finding regarding the new evidence and the deference it properly gave to the trial court with respect to old evidence – merits deference. *See Hernandez v. New York*, 500 U.S. 352, 366-69 (1991) (holding that "clearly erroneous" standard applies to this Court's review of state trial court *Batson* rulings).

ARGUMENT

THE STATE HABEAS COURT DID NOT COMMIT CLEAR ERROR WHEN IT REJECTED FOSTER'S *BATSON* CLAIM.

"Racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Powers v. Ohio*, 499 U.S. 400, 402 (1991). Defendants are not entitled, however, to a

jury of any particular composition, *Taylor v. Louisiana*, 419 U.S. 522 (1975), and the Constitution does not prohibit the "accused or the State to eliminate persons thought to be inclined against their interest" regardless of race. *Holland v. Illinois*, 493 U.S. 474, 480 (1990); *see also Hernandez v. New York*, 500 U.S. 352, 359-60 (1991). "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Hernandez*, 500 U.S. at 460 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977)). Foster, the opponent of the strikes, bore the burden of establishing purposeful discriminatory intent in the trial court and on direct appeal. *Purkett v. Elm*, 514 U.S. 765, 768 (1995). In the state habeas court, Foster again bore the burden and had to show he had new facts to overcome that presumptively valid finding of the Georgia Supreme Court. He failed to make this showing.

Before this Court, Foster relies on the new evidence in two ways. First, he argues that, standing alone, "the notes and records establish that the prosecution was motivated by discriminatory intent." Pet'r Br. 26. Next, he argues that the new evidence – most of which did not touch upon the specific reasons offered by the prosecution for its strikes – should lead this Court to revisit and overturn the state courts' repeated conclusion that the prosecution's race-neutral reasons for striking the black prospective jurors were not pretextual. Neither argument has merit.

Reviewed in context, the new documents should be seen for what they are – notes preparing for a jury array challenge and a preordained *Batson* challenge to any and all peremptory challenges to black prospective jurors. The new evidence does not show discriminatory intent; and Foster – who declined to obtain any testimony from the prosecutors regarding the notes – can only speculate that it does. As to most of the notes, we do not know who wrote, who saw, who authorized, or who relied upon them. The habeas court was correct in discounting their relevance. They assuredly do not, standing alone, prove that "the prosecution's intention was to strike every black prospective juror." Pet'r Br. 28.

The state habeas court also did not commit clear error in adhering to the Georgia Supreme Court's affirmance of the trial court's rejection of Foster's *Batson* challenge. The prosecution set forth multiple reasons why no reasonable prosecutor would want Hood or Garrett (or the other two black prospective jurors peremptorily struck) on their jury. Foster relies on a distorted form of comparative-juror analysis, which ignores that most jurors have some strengths and some weaknesses (from the prosecution's perspective). It is altogether unsurprising that a few white jurors, when dissected, possessed a negative attribute cited by the prosecution as one of the many bases for striking Hood or Garrett. The trial court's ruling on the third step of *Batson* was eminently reasonable, as was the habeas court's adherence to that

ruling even after taking the new evidence into account. This Court should affirm.

I. The State Habeas Court Did Not Commit Clear Error When It Found that the New Evidence Failed to Show that the Prosecution Acted with Discriminatory Intent When Evaluating Prospective Jurors.

Under Georgia law, the doctrine of res judicata ordinarily bars a petitioner from asserting on state habeas a claim – such as Foster's *Batson* claim – that was rejected on direct review. *Bruce v. Smith*, 553 S.E.2d 808, 810 (2001); *Humphrey v. Morrow*, 717 S.E.2d 168, 178 (2011). Attempting to overcome the res judicata bar, Foster introduced in his habeas proceeding documents he had obtained from the district attorney's file after direct review had ended. These documents included (1) the jury venire sheets, which highlighted the black prospective jurors in green (JA 253-78); (2) six black prospective jurors' questionnaires, which had the race of the individuals circled (JA 311-42); (3) Investigator Lundy's notes on certain black prospective jurors (JA 293-94); and (4) additional notes whose author(s) is unknown, including a list of jurors who were a "definite no" (JA 287-90, 295-98, 299-310).

After a thorough review of the prior state courts' decisions and the new evidence, the state habeas court held that Foster failed to "show[ ] any change in the facts sufficient to overcome the res judicata bar."

JA 192. Stated the court, "[t]he notes and records submitted by Petitioner fail to demonstrate purposeful discrimination on the basis that the race of prospective jurors was either circled, highlighted or otherwise noted on various lists." JA 195.[9] That decision – based on a record created in the state habeas court and following a hearing at which live witnesses testified – is reviewed for clear error. *See Hernandez v. New York*, 500 U.S. 352, 366-69 (1991) (holding that "clearly erroneous" standard applies to this Court's review of state trial court *Batson* rulings).

A. None of the Specific Pieces of New Evidence Shows an Intent to Discriminate.

Foster insists that "the notes and records establish that the prosecution was motivated by discriminatory intent." Pet'r Br. 26. But his new evidence suffers from two fundamental flaws. First, because he did not call either of the prosecutors to the stand, he can only speculate as to the meaning of various markings and writings, the author of many of them, and whether the two prosecutors at trial (District Attorney Lanier and Assistant District Attorney Pullen) even saw many of them. Second, given the pre-voir dire motions filed by the defense, the prosecution team had ample *non*-discriminatory reason to

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[9] Foster's claim (Br. 20) that the habeas court "did not address any of the other lists or notes" is therefore incorrect.

note who the black prospective jurors were. For these and additional reasons, the state habeas court had ample grounds to reject Foster's claim that the new evidence showed that the prosecution acted with discriminatory intent. This can be seen by walking through the four types of new evidence relied upon by Foster.

1. Juror venire sheets and juror questionnaires

Foster did not wait for jury selection to begin before asserting *Batson* challenges. Rather, well before voir dire even began, he filed a blunderbuss motion asking the trial court to "require the State to show that each one of its peremptory strikes of black persons is not racially motivated." JA 20. And to assist the court in making "an accurate determination of the State's motives," he asked the court to have "Questionnairs [sic] be sent to all the prospective jurors in the case." JA 19. On top of that, Foster filed a pre-jury-selection motion challenging the racial composition of the jury array. TR 199. It is hardly surprising, therefore, that persons in the prosecutor's office made notations indicating which prospective jurors were black.

Foster places great emphasis on the four copies of the jury venire sheets from the district attorney's file which show that black prospective jurors' names are highlighted in green and had a "B" beside them (*see* Pet'r Br. 14-15, 26-27); and that the race is circled on

the questionnaires of six black prospective jurors (*see* Pet'r Br. 16, 27). Yet Foster ignores his own role in prompting members of that office to do that. How could the prosecution respond to a challenge to the racial composition of the jury array without noting which prospective jurors were black? Indeed, the typed list from the prosecutor's file listing "name, address, *race*, sex, and age" of each person on the jury venire (JA 279-86) was compiled at *defense counsel's* request in preparation for the jury-array challenge. *See* PTH 4/15/87 at 6, Defense Ex. 1.

And given the *Batson* challenge repeatedly threatened, even prior to the excusal of any prospective juror, the notations on the jury venire sheets and questionnaires indicating which prospective jurors were black is not surprising and is not evidence of invidious intent. Georgia prosecutors – having received no additional guidance from this Court or the Georgia Supreme Court on implementing *Batson* – could not know with certainty what they had to show in the second and third steps of the *Batson* inquiry. Thus, for example, in making his (step two) articulation of race-neutral explanations, the District Attorney Lanier addressed all eleven black prospective jurors that were on the venire, even though we now know that he only needed to address the three black prospective jurors challenged by the defense. JA 43-44.

What the prosecutors did know was that if they ultimately chose to use a peremptory strike on a black juror, they would need to defend against any

suggestion that the strike was racially motivated – and that to make such a defense, they would need to maintain detailed information on the individual black prospective jurors. That information would be necessary for the initial *Batson* hearing before the trial judge, in responding to a motion for new trial, and for briefing on direct appeal. *See, e.g.*, TR 432 (State's response to motion-for-new-trial briefing). Preparing for racial challenges by noting which prospective jurors are being challenged – including on questionnaires – does not establish a discriminatory intent.

The prosecutors gave sworn affidavits in the state habeas proceedings that they did not make, instruct anyone to make, or rely upon the green highlights on the venire sheets. JA 168-71. Both prosecutors reaffirmed that their reasoning for exercising the challenges were entirely race-neutral. *Id.* That testimony stands unrebutted because Foster did not attempt to depose or call the prosecutors for cross-examination to challenge this testimony.[10]

Foster instead relies upon unsupported speculation when he attempts to assign racial animosity to those notations. But he had the burden of showing that the new evidence overcame the res judicata bar

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[10] In practice, if one party presents the affidavit as direct testimony in a state habeas proceeding, which is allowed by law in Georgia (O.C.G.A. §9-14-48(a)), the opposing party may call that affiant to testify on cross-examination at any subsequent evidentiary hearing. *See* HT 131. Foster did not even attempt to call the prosecutors for cross-examination purposes.

and changed the result reached on direct review. Yet he offered nothing beyond the bare existence of the notations on the documents. The trial court quite properly concluded that that did not suffice.

2. Investigator Lundy's notes

a. In his role of assisting in jury selection, Lundy made notes about his personal knowledge of individual prospective jurors and his personal opinion of those individuals. These documents do not establish racial animosity; to the contrary, they are entirely consistent with the State's explanation of its approach to jury selection – that the State sought to obtain all the information possible on all prospective jurors.

Lundy testified in the habeas proceeding that the prosecutors "collected the criminal records of *all* the [prospective] jurors in preparation for voir dire," HT 182 (emphasis added), and that prosecutors had members of the district attorney's office review the venire sheets and make notes on it with regard to any prospective juror with whom they were familiar. HT 190. Lundy said he created notes of information he knew "off the top of [his] head" from living in the area all his life. HT 205-08, 275, 276; JA 293-94. Thus, for example, he wrote with respect to one prospective juror, "brown car"; and as to another, "very neat." JA 293.

Lundy's focus indeed appeared to be the black prospective jurors. That seems to have been because

Floyd County had a relatively small black community in 1987 (TR 265 (11.4%)), and Lundy had been a resident of that community his entire life.[11] And it is entirely consistent with Lundy's testimony that "[the State] investigated everybody that was on that [venire] sheet," HT 218-19, and that the entire office would be involved. HT 219, 226-27; JA 116, 127.

This testimony corroborated the district attorney's testimony at the motion-for-new-trial hearing that background checks were done on *all* on the prospective jurors, both black and white. JA 116. For instance, the prosecutor stated that he learned that Nicholson and Graves, both prospective white jurors, were likely to be good jurors based on the opinion of one of his assistant district attorneys. TR 429. Blackmon, a white prospective juror, was recommended by a city police officer. TR 429-30. Hall, Nicholson, DeDuerwaerder, Horner, Hatch and Cadle, all white prospective jurors, were known by the prosecutors to have previously served on petit or grand juries. TR 429-31. For good reason, then, the habeas court found that "every prospective juror,

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[11] The record does not bear out Foster's argument that his case was "racially charged." *See* Petr.'s Br. 2. Prospective jurors were asked by the defense what their opinion was of race relations in the community. The overall impression was that race relations in the community were good. *See, e.g.*, T 472 ("better than most places"), T 848 ("above average"). Additionally, a number of prospective jurors lived in integrated neighborhoods, (*see, e.g.*, T 196-97, 226, 474, 602, 712, 867, 967), and no one identified any community pressure about the resolution of the case.

regardless of race, was thoroughly investigated and considered by the prosecution before the exercise of its peremptory challenges." JA 194. Foster introduced no evidence to the contrary.

b. Foster trains his attention on Lundy's notation, with regard to prospective juror Hardge, that she "might be the best one to put on the jury" (JA 294), and his notation that "if it comes down to pick [sic] one of the black [prospective] jurors, Ms. Garrett, might be okay." JA 345. Critically, however, Foster chose not to ask Lundy what he meant by these notations and what discussions (if any) he had with the prosecutors about them.

Foster likewise failed even to attempt to cross-examine the prosecutors about any knowledge, purpose, or reliance upon these notes. At the motion-for-new-trial hearing, however, the prosecutor actually provided a race-neutral basis for these notations. In discussing their juror selection process, the prosecutor made clear that the State had no discriminatory intent, that its "purpose was, in fact, the contrary, and that there were good and sufficient reasons for us to *actively look for black jurors* in the trial of this case." JA 99 (emphasis added). Specifically, the prosecutor explained that there was no reason to discriminate on the basis of race in selecting the jury because the State's primary witness, Lisa Stubbs, was black. JA 100. He stated that he was actively seeking to place a black prospective juror on the panel to avoid the potential for the defense to make a "white lynch mob argument" in the penalty phase of trial. JA 100.

These statements bring the ambiguity of Lundy's notes into focus – an ambiguity for which he is responsible based on his tactical decision not to obtain additional information about the origins and purpose of the notes. They surely do not prove discriminatory intent; and the state habeas court had every reason to discount them.

3. Additional notes by unknown author(s)

Foster also relies heavily on notes from the district attorney's file on three black prospective jurors which lists them as "B#1, B#2, and B#3" (JA 295-97). *See* Pet'r Br. i, 3, 16, 21, 23, 27, 35, 38, 41. Once again, though, it appears these notations were prepared, at some point, to address the defense's *Batson* challenge. In fact, "Batson issue" is noted on the top of one of the pages in question. JA 296. Given that black prospective jurors were the only recognized class that *Batson* addressed at the time of Foster's trial, these notes' focus on the black prospective jurors is not proof of – or even suggestive of – discriminatory intent.

Further, Foster attempted to have Lundy identify the author of all the notes from the district attorney's files *with the exception of these*. HT 208-10. And as with all his new evidence, Foster made no effort to have the prosecutors identify these notes. Instead, he chose to create a state-court record with the author unknown, the notations' purpose unknown, and their

timing unknown. By failing to support his allegations with nothing but conjecture, Foster did not establish discriminatory intent; and the habeas court did not commit clear error in so concluding.

b. Foster also relies heavily on two lists of unknown provenance, one setting out jurors who were a "definite no" (JA 301), the other listing all the prospective jurors and placing the letter "N" next to 10 of the names (JA 299-300). The latter list correlates with the strikes ultimately made by the State with the exception of one prospective juror listed as "N," but not struck by the State. JA 33, 300. The former document listed all five prospective jurors as "definite no's." JA 301. Foster's principal contention is that the "definite no" list standing by itself shows a racially discriminatory intent. *See, e.g.*, Pet'r Br. 22. It does nothing of the sort.

The list simply shows that some unspecified member of the prosecution team decided – perhaps in consultation with other team members – that the five remaining black jurors warranted peremptory strikes. It tells us nothing about the *reason* they warranted peremptory strikes and thus tells us nothing relevant to step three of *Batson*, which is whether the prosecutors' race-neutral justifications for the strikes were pretextual.[12]

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[12] Foster also relies on the "definite no" list for a narrower reason: as purportedly showing that the prosecutor was untruthful when he explained his thought process with respect to black

(Continued on following page)

B. Some of the New Evidence Introduced in State Habeas Proceeding Corroborates the State's Reasons for the Strikes.

Instead of establishing a racially discriminatory purpose, the notes support the legitimacy of the prosecution's concerns as to the two black prospective jurors at issue and the fact finding of the habeas court.

1. Eddie Hood

One portion of notes from the State's file appears to have been taken contemporaneously with voir dire. JA 303-10. Lundy could not identify who made these notes. But with regard to Hood, the document notes:

> See Q8 – not answered – W – WGaHosp – Slow D.P. answer – Church of Christ – very ambiguous answers confused. No eye contact. Very soft spoken – bro. counsel people involved in drugs – against alcohol based on church – strange eyes – roll round and round and bug out – Δ
>
> did not asked (sic) most questions asked of other jurors (av 22-27 mins per J – here < 11 min) See Juror 35 CofC

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prospective juror Marilyn Garrett. Pet'r Br. 31. Because this is part of Foster's challenge to the specific reasons offered by the prosecution for its strikes, it is addressed in the next section of the brief.

JA 303. These notes mirror the reasons for striking Hood given by the State in open court and its subsequent pleadings. *See* §II(A)(1), *infra*. The prosecutors' explanation of why he struck Hood and not white prospective juror Blackmon, who – like Hood's wife – had previously worked at Northwest Regional Hospital, is also supported by notes admitted in the state habeas hearing. JA 308. These notes will be addressed in §II(A)(1), *infra*.

2. Marilyn Garrett

The notes from the prosecutors' file also clarify several factors Foster has taken issue with as to Garrett. Notes, which appear to have been taken contemporaneously with voir dire, state:

> Broadface – would not look at ct during V.D. Very short answers – almost impudent – not opposed to D.P. said "yeah" to judge 4 occasions – 2 jobs Wyatt changed questions on insanity – Strong reaction to Pot question – felt J used – Looked at floor during D.P.

JA 308. As with Hood, these notes mirror the reasons the State provided in open court and its subsequent pleadings for striking Garrett. *See* §II(A)(2), *infra*.

Indeed, the State specifically referenced this note in explaining why it chose to strike Garrett. JA 55. The notes also establish that these were contemporaneous observations, not "after-the-fact" rationalizations, as asserted by Foster. *See* Pet'r Br. 37 n.43. And the notes (as explained in more detail in §II(A)(2),

infra) support the prosecutor's testimony that one reason he struck Garrett was that Lundy informed him that Garrett's cousin had been arrested for drug charges and was being prosecuted by the same district attorney's office as was handling Foster's case. JA 105, 112.

* * *

All told, then, the new evidence supports the reasons actually given by the prosecutors for striking the two black prospective jurors in question; Foster's insistence that they show racial motivation is pure conjecture because of his own tactics in state habeas review; and the State's need to respond to the defense's jury-array motion and inevitable *Batson* challenges explain the majority of the notes. The habeas court did not commit clear error when it found that the new evidence did not establish that the State acted with a discriminatory motive.

In *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005), this Court found that "the [juror] strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State." 545 U.S. at 266. As found by the state habeas court, the same cannot be said for Foster.

II. Foster Failed to Show that the State Habeas Court Committed Clear Error in Crediting the Trial Court's Conclusion that the Prosecutors' Strikes Were Not Pretextual.

Under *Batson* "the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003). Accordingly, in conducting this third-prong analysis, the state habeas court had to review the State's explanations from trial and the motion-for-new-trial proceedings in light of the new evidence Foster garnered from the prosecutors' files. Conducting this analysis, the state habeas court concluded "that the State put forward multiple race-neutral reasons for striking each juror, and [Foster's] claim of inherent discrimination is unfounded by the record." JA 195-96. This was not error, let alone clear error.

A. The Record Shows No Pretext in the Strikes or the Treatment of Similarly Situated White Prospective Jurors.

The purpose of the peremptory challenge since common law has been "to eliminate person[s] thought to be inclined against [the proponent of the strike's] interest." *Holland*, 493 U.S. at 480. "Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminating extremes of partiality on both sides,' thereby 'assuring the selection of a

qualified and unbiased jury.'" *Id.* at 484 (quoting *Batson*, *supra* at 91).

For that reason, in preparing for their peremptory strikes, the prosecutors had to analyze all aspects of each prospective juror. The reality of jury selection is that while a prospective juror may have some answers or beliefs that make them an appealing juror for the State, the same prospective juror may have other characteristics that make them less desirable or a risk for the State in the particular case. While a white prospective juror and a black prospective juror may have one characteristic in common, each venireman is obviously the sum of all characteristics, not a single aspect. Thus, the sum, not a part, is the proper comparison. The Georgia state courts understood this phenomenon and were not giving *Batson* short shrift when they rejected Foster's effort to craft a *Batson* violation by using a distorted form of comparative-juror analysis. *See* JA 134 (trial court stating that "the nature of this selection process is one involving many, many aspects of each venireman. The possible permutations are mindboggling.").

In his brief to this Court, Foster asserts that the prosecutions race-neutral reasons for peremptory strikes were pretextual only with respect to two black prospective jurors, Eddie Hood and Marilyn Garrett. As shown below, the prosecution had multiple race-neutral reasons for not wanting either person on the jury in this particular case. Also established is that the prosecution had multiple race-neutral reasons for not wanting on this jury the other two black

prospective jurors who were removed through peremptory strikes.

1. Eddie Hood

The prosecutor agreed that, on first glance, Eddie Hood "was exactly what he was looking for" in terms of age, employment and marital status. JA 44. A more thorough review of Hood, however, revealed a prospective juror who might have been "inclined against the [State's] interest" and would "be most partial toward the other side." *Holland v. Illinois*, 493 U.S. 474, 480, 484 (1990).

The prosecutor struck Hood because he:

- had a son the same age as Foster who had been convicted by the same district attorney for theft charges;
- was a member of the Church of Christ, whose members the prosecutors believed were against the death penalty;
- had a brother who had been a drug counselor;
- had a wife who worked at Northwest Regional Hospital, where mental health patients were treated;
- was hospitalized during voir dire;
- had ambiguous responses to questions regarding the death penalty; and

- was asked very few questions by defense counsel during voir dire.

JA 45-48.

Taking into account the defendant and his crimes as well as the State's awareness that Foster "intended to assert a defense involving mental illness and drug usage" (JA 149-50), the state courts' findings that the strike of Eddie Hood was reasonable and without purposeful discrimination is not clearly erroneous.

a. Prosecutors were justifiably concerned that Hood's perspective on this case would be influenced by his son. Hood had an 18-year-old son, close in age to Foster; and he had been charged with theft by taking and had been prosecuted by the *same district attorney* as Foster. JA 44-45, 48, 104-05; TR 14. This reason is plainly race-neutral: accepting a prospective juror whose son or close family member the office had prosecuted is well-recognized as an inherent risk. *See, e.g. Hernandez*, 500 U.S. at 355-56 (did not contest two prospective jurors who had brothers being prosecuted by the same district attorney prosecuting Hernandez); *United States v. Houston*, 456 F.3d 1328 (11th Cir. 2006); *United States v. Rodriguez*, 581 F.3d 775, 791-92 (8th Cir. 2009). Recognizing this risk, the prosecutor testified at the motion-for-new-trial hearing that, based on his experience, he "stay[ed] away from jurors with family members who are criminally connected in some way or another." JA 104. The

trial court found this factor "most persuasive" in determining this issue. JA 135.

Foster argues (Pet'r Br. 41-42) that two other prospective jurors were similarly situated because they had sons near the same age as Foster. But neither of these prospective jurors, Martha Duncan nor Billy Graves, had a son with a prior theft charge who had been prosecuted by the same district attorney's office. In fact, no other person accepted by the State had a son or daughter prosecuted by the district attorney. The only other person that had a close relative that had been or was being prosecuted by the same district attorney was Marilyn Garrett, who was also struck by the State.

Billy Graves was not similarly situated to Hood. Although both Hood and Graves were familiar with police officers who would testify in the case (T 279, 522-23), Graves knew the police chief, as well as three other officers; his brother had been a policeman for approximately 20 years; and Graves had been in the Navy and worked shore patrol when in port. T 522-24. Adding to this juror's appeal for the State was the fact that Graves knew the District Attorney and Grave's wife had campaigned for the District Attorney. T 522. With this seeming potential to be sympathetic to the State, the prosecutor understandably accepted Graves as a juror over Hood. Even though they shared a similar characteristic or two, it is clear the two men were not similarly situated.

Likewise, Martha Duncan was qualitatively different than Hood. Duncan had a nephew, not a son, who had been convicted of armed robbery. T 966. As found by the trial court, "[a] person's feelings for a son are ordinarily much stronger than for a nephew; one's interest in a person living under one's own roof is ordinarily much stronger than one's interest in someone living in another town." JA 136. In addition, Duncan was not sure whether her nephew was the victim or the perpetrator of the armed robbery. JA 107, T 964-66. And Duncan's nephew had not been prosecuted by the district attorney in this case, and therefore had no reason to harbor resentment against the individual prosecutor in this case. Plus, unlike Hood, Duncan could identify with the victim because she was also a school teacher and lived near the crime scene. JA 107; T 966.

Foster also attempts to equate Don Huffman with Hood on this ground, which is more of a stretch than Duncan or Graves. Although Huffman was 20 years old, close to Foster's age, he had not been prosecuted by the same district attorney's office and did not have a family member who had been prosecuted by the district attorneys' office. Foster's piecemeal attack – focusing on one factor while ignoring the many other differences between prospective jurors – is a distortion of comparative-juror analysis.

b. The prosecutors also made clear their belief, based on their past experiences and speaking with ministers of the Church of Christ, that the church took a stance against the death penalty. JA 46, 84,

113-14. This was not an after-the-fact rationale by the State. Prosecutors made this belief known early in voir dire, prior to any strikes or *Batson* challenge, during a discussion about what voir dire questions were objectionable. T 372.[13] That belief was taken into account in the decision to strike Hood.

Supporting the prosecutors' stated belief concerning the Church of Christ, during the initial *Batson* challenge, the prosecutor pointed out three other members of the Church of Christ who were also removed for cause. These three members were the only other Church of Christ members in the venire and were white: Thelma Terry, Gertrude Green and Vonda Waters. JA 46. Thelma Terry was excused based on her inability to be impartial and inability to consider the death penalty. T 558. In her questionnaire, which the State pointed out to the trial court (T 558), in answer to the question was there anything that would cause her "difficulty or hardship" if selected as a juror, she answered, "Since this is a death penalty, I do not feel I have the right to decide whether a person should live or die, I feel only God can do that." JQ#35, p. 5.

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[13] Defense counsel objected to a question posed by the prosecutor alleging the prosecutor "did not have a specific factor in his question." T 372. The prosecutor responded, "I had one, Your Honor, and I didn't ask it; and that particular juror was a member of the Church of Christ which does have a position against the death penalty." *Id.*

Gertrude Green was excused for cause on a motion made by the State and joined by the defense. T 730. She did not state she could vote for the death penalty, but not life imprisonment, as alleged by Foster. *See* Pet'r Br. 45. In fact, it was entirely unclear if Ms. Green understood any of the trial court's questions and her answers are equivocal at best. T 725-30. Vonda Waters, also a white prospective juror, was excused for cause by agreement. T 893.

In the end, all the members of the Church of Christ – white and black – were excused for cause or struck peremptorily. The trial court found "very credible the state's concern regarding religious affiliation." JA 137. That finding is unaffected by a page of notes within the new evidence upon which Foster relies. *See* Petr.'s Br. 43 (citing JA 302). The page has the heading "Church of Christ" and under that heading is listed: "don't take a stand on Death Penalty," "left for each individual member," "Romans – capital punishment," "Lord decreed," "D.P. have advocated," "regard life precious," "NO," "small," "No Black Church," "left up to individual parishioners." JA 302. Foster focuses on the words "No Black Church," but as with the individual prospective jurors, he handpicks sections of the notes to draw offensive inferences. Foster never sought clarification of these notes in the state habeas proceedings, and his argument is merely speculation that is not supported, particularly since three of the four Church of Christ members on the venire were white. *See* JQ#35 1-2; JQ#53 1-2; JQ#78 1-2.

c. Additional concerns about Hood centered around his potential partiality to Foster based on Hood's wife's place of employment and his brother's former job as a drug counselor. As found by the Georgia Supreme Court on direct appeal, "The prosecutor was familiar with Foster's background and knew that Foster intended to assert a defense involving mental illness and drug usage." JA 150. Based on the knowledge of the "primary defense" (JA 46), the State had legitimate concerns regarding Hood's wife, who worked at Northwest Regional Hospital, which treated the mentally ill; and his brother, who counseled individuals addicted to drugs. JA 46. These factors in Hood's life could justifiably lead any prosecutor to believe that Hood would sympathize with Foster and be more partial to the defense.

Blackmon, an alleged similarly situated white prospective juror, had previously worked at Northwest Regional Hospital, but was distinctively different from Hood and reasonably not struck by the State. T 939. The State knew the defense would allege that Foster was mentally ill and temporarily insane when he committed the crimes. JA 150. Unlike Hood, who had no opinion on an insanity defense (T 280), Blackmon stated that she had "mixed feelings about insanity" as a defense and believed that often "people just claim it looking for sympathy." T 943. In explaining his acceptance of Blackmon, the prosecutor testified at the motion-for-new-trial hearing, "She felt like anybody who pleads insanity, that that's just a trick, that they – just to – it's an excuse." JA 110.

Thus, while she worked at a hospital that treated the mentally ill, she had strong feelings favorable to the State's position as to mental health. The prosecutor took all these facts into consideration and "evaluated the whole Arlene Blackmon." JA 110. The trial court found the "decision to forego the risk" of placing Hood on the jury was "understandable." JA 137. That finding was bolstered by new evidence introduced during the state habeas proceeding. Supporting the prosecutors' explanation to the trial court, there are notes regarding Blackmon which clearly state "great answers on sanity." JA 308.

d. Hood's hesitation in responding to "the death penalty questions," was also a partial basis for the State's strike. JA 45-47. White prospective jurors George McMahon and Bobbie Grindstaff were also struck for their hesitation in response to the death penalty questions. TR 425, 428; *see also* JA 306, 310. Foster does not contest that Hood hesitated, but argues that Hood was unequivocal in his ability to impose a sentence of death. Petr.'s Br. 43-44. But, of course, a transcript can show what seems to be an unequivocal answer even though hesitation preceded that answer. Foster did not contest Hood's hesitation during the initial *Batson* hearing or at the motion-for-new-trial hearing. JA 48-49, 92. And the trial court, who heard Hood's voir dire responses and whose findings should be given deference, found the explanation "credible." JA 138.

e. Also pertinent to the State's decision to strike Hood was the scant time the defense spent questioning

him. JA 47. The prosecutor noted that, compared to white prospective jurors, the defense spent considerably less time questioning Hood. JA 47; *see also* JA 303. The record bears this out as it shows the defense's questioning of Hood encompasses only four pages (T 278-82), whereas the white prospective jurors immediately before and after Hood in the venire took up more than twice that number (*see* Ratliff T 221-39;[14] Nicholson T 293-302[15]). The prosecutor properly observed that the defense did not ask Hood about a series of issues it asked of the majority of other prospective jurors, such as his opinion of: cocaine's influence or its addictive properties; publicity about the case; temporary insanity; community attitude; or community pressure. T 278-82.

If a "prosecutor's questions and statements during voir dire" can "support or refute an inference of discriminatory purpose," then the defense's lack of questions in voir dire is certainly worth an equally contrasting inference by the State. *See Batson*, 476 U.S. at 97. The trial court found these bases "credible" and "completely understandable." JA 138.

f. Additionally, Hood asked to be excused from jury service, and he acquired food poisoning and had to be hospitalized during voir dire. JA 45-46. Failure

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[14] A page and half of this portion of the voir dire encompasses a bench conference.

[15] One page of this voir dire was left blank to account for mis-numbering.

to be able to serve after hospitalization is a legitimate concern. Although the trial court was later informed that Hood had been able to return to work (T 1303), this does not negate the State's concern. The trial court, who witnessed Hood both before and after his hospitalization, found "it was understandable that the state would not want to take a chance on his continued good health." JA 136.

g. In attempting to draw a parallel with *Miller-El*, Foster alleges that Hood was "singled out" during voir dire by the State with manipulated questioning. *See* Petr.'s Br. 41. This argument is not supported by the record. Foster argues that the prosecutors "encouraged" the first eight jurors "to give acceptable answers about pretrial publicity by prefacing their questions" to these jurors with the allegedly guided phrase of "what we are looking for is what you know so that you can be fair and impartial." *Id.* Foster claims that this guided phrase was omitted from Hood's questioning, and therefore the State was attempting to manipulate his answers. Yet the record shows only that the first three prospective jurors questioned by the parties were white and received the guided phrase (T 190, 218, 244);[16] and thereafter the prosecutors gave the phrase only intermittently and without regard to race. *See e.g.*, T 432 (Coultas, not prefaced and accepted by the State, struck by defense); T 313, 325, 331 (Barbogello, not prefaced and

[16] The first and fifth prospective jurors were excused for cause after questioning solely by the trial court. T 188, 267.

excused for cause on motion by defense). Foster's allegation of manipulative questioning is without support.

Like the trial court, the Georgia Supreme Court noted the prosecution's concerns regarding Hood's son, wife, brother, church and his hesitancy in voir dire in concluding that the strike was not racially motivated. JA 150. The state habeas court credited both prior holdings and the trial court's fact findings. JA 196. If race is taken out of the equation, any prosecutor may justifiably choose to exercise a peremptory strike on a person such as Hood, particularly given the facts and defenses in this case. Foster has failed to show that the factual finding by the state habeas court that there was no racial discrimination in striking this prospective juror constitutes clear error.

2. Marilyn Garrett

The State also readily acknowledged that, based on her jury questionnaire, Marilyn Garrett possessed several characteristics they were seeking in a juror. Following her voir dire questioning, however, the State determined that Garrett was a risk given the facts of this case. The State struck Marilyn Garrett because she:

- was "curt" and disrespectful to the trial court;
- was not a strong juror;

- gave answers the prosecutor knew to be untruthful;
- was not in a stable home environment; and
- worked with underprivileged and low-income children in the Head Start program.

JA 55-57, 93-97, 105.

a. Garrett's demeanor in court during voir dire revealed qualities no prosecutor wants in a juror. JA 55. The prosecutor explained that Garrett "would not look at the Court during the voir dire, kept looking at the ground"; her answers were "almost curt and impudent"; and she was disrespectful to the trial court by answering "yeah" to the court's questions. *Id.* Even a cold record shows that Garrett's voir dire answers are indeed terse, and although her answers were not transcribed as "yeah" by the court reporter, neither the defense nor the trial court took issue with the State's assertion. Also supporting the likelihood of a transcription alteration, defense counsel argued at the motion-for-new-trial hearing that Bonnie Harper[17] said "yeah" or "uh-huh" numerous times (JA 94; TR 545); like Garrett, however, her answers are transcribed as "yes." T 191, 192, 201, 205, 209, 210, 213.

b. Even putting to the side these negative impressions from Garrett, the prosecutors' main concern

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[17] The prosecutor inadvertently called this prospective juror Bonnie Thomas. Harper was not similarly situated to Turner because Harper had been White's hairdresser. T 186.

was "her association and involvement in Head Start" as a teacher's aide. JA 56, 110. Head Start, unlike general school programs, provides a number of services specifically targeting low-income families and underprivileged children. Knowing Foster would present evidence at trial that he "came from a low income underprivileged, disadvantaged youth, which caused what happened to White," the prosecutors' concerns about accepting Garrett were valid. JA 56. White prospective juror Lou Ella Hobgood, who worked for the Ethel Harpst Home for Children and Youth, "a home for disadvantaged youth," was also struck, in part, on this basis. TR 425, 428. In finding the strike of Garrett "sound," the trial court noted the defense's stated strategy of attempting to find jurors who possessed "empathy for the 'socially, culturally and educationally deprived life-style' of the Defendant." JA 141 (citing T 85-89).

Foster's argument that white prospective juror Duncan was similarly situated to Garrett is unavailing. Duncan was also a teacher's aide in the school system, as noted by Foster, but in the regular school system. Unlike Garrett, she did not specifically work with underprivileged, low-income families and children – Foster's target juror type. The two are qualitatively different.

c. Further, no prosecutor would risk placing an individual on a jury who was misleading during voir dire. Garrett alleged she was not familiar with the North Rome area, which was where the murder occurred. JA 56. Garrett's questionnaire revealed,

however, that she attended junior high school two blocks from the crime scene. JA 56, 97-98; HT 241. Garrett also drove by the North Rome area every day on her way to work. The prosecutor testified at the motion-for-new-trial hearing, "When she said that, she was not familiar with the north Rome area, and yet she went to school there, and she works there, I felt that her answer was inaccurate." JA 98; *see also* JA 97-98.

Again, Duncan is distinguishable. Although Duncan lived in the area near the crime scene, she was not asked if she was familiar with the North Rome area as was Garrett. Instead, she was asked if she was familiar with the *neighborhood* in which White had lived. T 959, 966; *see also* JA 108.[18] Duncan, unlike Garrett, candidly stated that she lived in a nearby neighborhood, but was not familiar with White's neighborhood. *Id.* The prosecutor had no basis to believe Duncan was being less than forthcoming.

d. Garrett also had another serious flaw from the prosecution's perspective. Like Hood, Garrett had a relative, a cousin, with criminal charges. Two months before trial, Garrett's cousin, Angela Garrett, was arrested for cocaine possession and was being prosecuted by the district attorney's office. JA 105,

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[18] As Duncan lived in the North Rome area, there was no need to ask her if she was familiar with the general area.

116; *see also* HT 2447-48.[19] The prosecutor's investigator spoke with him about it "during the jury selection and made [him] aware of it." JA 105, 112. Although not stated in the initial *Batson* challenge colloquy, the prosecutor informed the trial court "shortly thereafter." JA 112. The trial court found that the district attorney's investigator, Lundy, had advised the prosecutors to strike Garrett. JA 141.[20] As with Hood, striking a prospective juror based on familial criminal activity or ongoing prosecution by the same district attorney's office is far from racially discriminatory. It is common sense.

Garrett also denied knowing anyone with a drug or alcohol problem. T 955. The State found this answer highly suspect because her cousin Angela had just been arrested and fired from her job as a basketball coach for cocaine possession. JA 105.

e. The trial court also credited the State's concern that Garrett's own financial situation made "her more likely to identify with the Defendant." JA 142. The court held that it believed that the prosecutors'

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[19] February 27, 1987 affidavit for arrest of Angela Garrett.

[20] In finding this testimony credible, the trial court found that it was "unclear" when the prosecutor knew the basis of this advice by Lundy, but it was "clear that the investigator believed that Mrs. Garrett's relation with a Miss Angela Garrett was a cause of concern" because she had just lost her job due to a drug arrest. JA 141-42. Notes submitted in the habeas proceedings with regard to Garrett state "a cousin of Angela Garrett" (JA 293); and "Angela" is written beside this prospective juror's name on the venire sheet (JA 256).

concerns "that the combination of holding two jobs and being the divorced mother of two indicated a less stable home environment," and these factors aligned with the "prime defense in this case." JA 142.[21]

f. Foster relies on the "definite no" list in the new evidence as purportedly showing that the prosecutor was untruthful when he explained his thought process with respect to the strike of black prospective juror Marilyn Garrett. Petr.'s Br. 31. For many of the reasons given in §I, *supra*, the record is barren of any information that supports the allegation.

The prosecutor stated in the motion-for-new-trial brief that he had "in *his* jury notes listed this juror as questionable." TR 438 (emphasis added). At the motion-for-new-trial hearing, the prosecutor elaborated, stating that he made the decision to strike Garrett after black prospective juror Shirley Powell was excused for cause. He informed the trial court that, in making this determination, he compared the attributes of white prospective juror Arlene Blackmon and Garrett and decided to use the strike on Garrett. TR 439. Foster argues that Garrett's appearance on the "definite no" list, on which Powell also appeared,

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[21] Foster also takes issue with the State's concern that Hood wanted off the jury and its concern that Garrett did not claim any hardships. It is qualitatively different for Hood, a man with grown children (HT 3034), to want off the jury and Garrett, a single mother with two small children (HT 2419) and two jobs, not to claim any hardships with jury service (HT 2421).

shows this statement was false, which, in turn, establishes racial discrimination. It does not.

Critically, Foster failed to establish that the "definite no' list was drafted by this specific prosecutor, was ever seen by this specific prosecutor, or was part of his thought processes. Foster readily could have found this information out, but chose not to. Lundy was the only person asked about the notes, and he could not identify who had written on the documents or drafted them. HT 210-15.

Lundy had never seen the handwritten document listing the prospective jurors with "N" by ten names and could only "guess" its meaning. HT 212, 215; JA 299-300. Foster did not attempt to question either prosecutor in the habeas proceedings about these notes.

These documents could easily be one of several drafted by the various individuals involved with the prosecution team in selecting a jury. In fact, during the *Batson* challenge in the trial court, the district attorney referenced his co-counsel's notes on other points. T 1374. This distinction strongly suggests that each prosecutor took his own notes. Speculation as to what one prosecutor proposed in the use of the State's strikes does not establish that these notes were the thought processes of both or that one prosecutor gave false statements to the trial court concerning his thought processes in striking the jury.

Moreover, other parts of the record are consistent with the prosecutors' statements regarding Garrett

and Powell. Unwavering throughout the notes is that Powell was to be struck by the State. *See* JA 261 ("NO!"); 293 ("I believe she would not be a very good person."); 307 ("NO NO NO NO NO"). The same cannot be said for Garrett. *See* JA 256, 262, 274, 293, 308. Additional notes substantiate the prosecutor's claim that Garrett was, at one point, questionable. *See* JA 345 ("Garrett might be okay").

Nor, of course, did the prosecutor's statement at the new-trial hearing go to the actual reasons why Garrett was viewed as a bad juror for the State. Even if he did misspeak in that proceeding, it did not pertain to the many reasons the State did not want Garrett as a juror (which are described in §II(A)(2), *infra*). Foster's effort to find fault with this one statement by the prosecutor does not remotely show racial discrimination.[22]

* * *

Based upon the reasons provided by the prosecutors, the state courts did not commit clear error in finding that the strike of Garret was not race-based. It is practical for a prosecutor not to risk placing an individual with these concerns on a jury. The Georgia Supreme Court noted Garrett's work with

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[22] In step three of the *Batson* inquiry "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge." *Hernandez*, 500 U.S. at 365. The trial court credited the prosecutor's reasoning (JA 142-43) and that finding should be given deference.

"low-income, underprivileged children," her cousin's arrest for drugs, and her "materially untruthful answers" in finding the strike was not racially motivated. JA 151. In turn, the state habeas court reviewed the new evidence and denied relief after crediting the factual findings of the trial court and the holding of the Georgia Supreme Court. JA 196. Foster has failed to show the state court habeas court's factual finding of no purposeful discrimination was clearly erroneous.

3. Evelyn Hardge

The defense conceded at the motion-for-new-trial hearing that the State's strike of Evelyn Hardge was justified and not racially motivated. JA 106, 1324.[23] In denying the motion for new trial, the trial court found "the State had ample reason to excuse her" and found Foster was not challenging the strike of this prospective juror. JA 51, 134. Likewise, the Georgia Supreme Court found that Foster conceded the strike was justified. JA 150. This juror is not at issue before this Court.

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[23] Prior to the defense's concession, the State explained that it struck Hardge because she spoke to Foster's mother outside the courtroom during voir dire (T 395; JA 49); she was "totally incoherent"; and the defense did not ask her a single question (JA 50). Defense counsel had no response to the State's race-neutral justification for striking Hardge. JA 51.

4. Mary Turner

Foster does not challenge the strike of Mary Turner in this Court. Even a cursory review of Turner shows why. The peremptory strike was not racially motivated, but was based on Turner:

- working at Northwest Regional Hospital;
- claiming to be Investigator Lundy's half-sister;
- being "less than candid" during voir dire;
- hesitating in answering the death penalty questions;
- favoring the defense during voir dire; and
- maintaining eye contact with Foster through voir dire.

JA 52-53.

a. Explaining his strikes by sworn testimony at the motion-for-new-trial hearing, the prosecutor testified that "[t]he bottom line on Mary Turner was, obviously, she was less than truthful with the Court and because of her family's criminal history." JA 110. Question 32 on the juror questionnaire asked, "Do you have a close friend or relative who has been accused or convicted of a crime or violence?" JA 139. Turner wrote, "no." *Id.* The prosecutor was aware, however, that Turner's brother-in-law, Otis Turner, had been charged with aggravated assault and burglary in May of 1986. JA 104, 140; TR 451-54. Further, her husband had been prosecuted and sentenced

by the same district attorney's office for carrying concealed weapons at a public gathering. JA 104; TR 490-92. On top of that, Turner claimed she knew no one with a drug or alcohol problem, even though her brother-in-law had criminal drug charges. JA 52-53. The trial court found the "state's unease with this venireman" "credible." JA 140; *see also* JA 55. The Georgia Supreme Court agreed, noting Turner's husband's convictions and her brother-in-law's repeated offense for "theft by taking, burglary and drugs." JA 52-53, 151.

b. An unusual aspect of this prospective juror was that she claimed in voir dire and on her jury questionnaire to be the half-sister of Investigator Lundy. T 598. Investigator Lundy repeatedly rejected this familial relation. JA 52, 128. The trial court noted the "disagreement" and found that "this kind of friction could not have been conducive to that prosecution." JA 140. The Georgia Supreme Court also noted this race-neutral reason. JA 151.

c. The trial court also credited the State's concern that Turner was more congenial to the defense and maintained eye contact with Foster throughout her voir dire. JA 53, 140-41. "The defense has insisted that 'body language' is important in the selection of jury (Trial Transcript at 107), and the Court must agree; it is just as important to the state as the defense, and the Court rules on that basis." *Id.* This Court has likewise noted the important role that demeanor may play in the selection of jurors. *Snyder v. Louisiana*, 552 U.S. 472 (2008) ("race neutral

reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention)"); *Thaler v. Haynes*, 559 U.S. 43, 44 (2010) (*per curiam*). These factual determinations that are based on credibility determinations and demeanor are rightfully within the province of the trial court. *See Hernandez*, 500 U.S. at 366.

d. Hesitation in answering the death penalty questions was another basis for the strike of this prospective juror. JA 53. Such nuances are hard to determine from a cold record, but when asked if she was opposed to the death penalty, Turner answered, "Not really, no." T 593.[24] Notably, when the prosecution stated hesitation as part of the basis for her excusal, the defense did not contest that this prospective juror hesitated. Instead, the defense argued in its brief to the trial court that her answers were "clear," but did not discuss the hesitancy. TR 391. Given that the trial court also had the opportunity to observe Turner's demeanor, Foster failed to show that the trial court's crediting of this factor was clearly erroneous.

It is clear that Turner lied during voir dire. This fact along with the remainder of the State's reasoning clearly establish that no prosecutor, regardless of the race, would want this individual on the jury. The strike was correctly found by the state courts to be

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[24] Strikes are "often based on subtle impressions and intangible factors." *Ayala v. Davis*, 135 S. Ct. 2187, 2208 (2015).

race-neutral and Foster failed to show this factual finding was clear error.

* * *

Although Foster has attempted to dissect these individuals and compare and contrast details about each to manufacture a "similarly situated" juror, he has failed. If a true and accurate assessment is to be done of the strikes and individual jurors, it must include the entire person and his or her entire voir dire. *See* JA 89-90. Conducting its analysis, the trial court agreed, holding, "The Court declines to analyze human beings as disconnected parts with disconnected attributes as the defense invites it to do." JA 137.

It is precisely this unique combination of factors that the State fully explained by setting forth the rationale and intricacies of their strikes. In conducting this third-prong analysis of *Batson*, the trial court also took into consideration the "obvious attentiveness" the prosecutors gave to the prospective jurors' written questionnaires and the extensive voir dire. JA 133. Evaluating the prosecutors' explanation for his strikes, the trial court found that "knowing the nature of the crime *and this prosecutor*,"[25] the State's reasons were "credible" and race-neutral. JA 133 (emphasis added). *See Thaler v. Haynes*, 559 U.S. 43, 49 (2010) ("the best evidence of the intent of the

[25] The trial judge knew the district attorney who testified as to the basis of the prosecution's strikes "a long time." T 1305.

attorney exercising a strike is often that attorney's demeanor"). The trial court concluded that the "prosecutors involved undertook long and careful assessment based on many factors," which contributed to the court's finding there was no purposeful discrimination in the strikes. JA 133-34. These determinations of the credibility and demeanor of the prosecutors, found by the trial court and relied upon by the Georgia Supreme Court and the habeas court, rest "peculiarly within the trial judge's province" and "in the absence of exceptional circumstances," should be deferred to by this Court. *Snyder*, 552 U.S. at 477.

In sum, the prosecution offered numerous race-neutral reasons for the peremptory strikes of the four black prospective jurors and the record, old and new, supports those reasons. The trial court and Georgia Supreme Court were correct in rejecting Foster's *Batson* claim initially; and the habeas court was correct in concluding that the new evidence so touted by Foster proved little.

B. This Court May Reverse the State Habeas Court Only if, After Giving Deference to its Factual Findings, it Concludes that the Court Committed Clear Legal Error.

The habeas court, understanding the weak support of Foster's claim, found he had failed to show purposeful discrimination in the selection of his jury. This factual finding should be given deference by this Court. *Batson*, 476 U.S. at 98 n.21.

Foster urges this Court to give no deference to the state habeas court's factual finding because that court reviewed a "cold record"; however, Foster created the cold record and he cites to no law to support his argument that factual findings in the procedural posture of this case are not entitled to deference; particularly when the habeas court expressly relied upon the trial court's findings. Beyond Lundy, Foster failed to show who drafted the admitted portions of the notes, when those notes were written, if they are the complete notes of the district attorney's office, and whether there were other notes or documents relied upon in making the decision on the peremptory strikes. Instead, Foster relied on almost complete conjecture on a socially sensitive issue to attempt to overcome the sworn testimony of the prosecutors and factual findings of the trial court.

Foster bore the burden of establishing that the habeas court's denial of his claim was clearly erroneous. As to that burden of proof, this Court has held, "where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Hernandez*, 500 U.S. at 369 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)). The evidence clearly allows "two permissible views," as established by the state courts' repeated denial of this claim.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court of Butts County, Georgia.

Respectfully submitted,

SAMUEL S. OLENS
Attorney General
BETH A. BURTON*
Deputy Attorney General
SABRINA D. GRAHAM
Senior Assistant
Attorney General
RICHARD W. TANGUM
Assistant Attorney General

OFFICE OF THE GEORGIA
ATTORNEY GENERAL
40 Capitol Square, SW
Atlanta, Georgia 30334
404-545-3499
bburton@law.ga.gov

Counsel of Record

No. 14-8349

In The
Supreme Court of the United States

TIMOTHY TYRONE FOSTER,

Petitioner,

v.

BRUCE CHATMAN, WARDEN,

Respondent.

On Writ Of Certiorari To The Superior Court Of Butts County, Georgia

REPLY BRIEF OF PETITIONER

STEPHEN B. BRIGHT*
PATRICK MULVANEY
PALMER SINGLETON
KATHERINE CHAMBLEE
SOUTHERN CENTER FOR HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, GA 30303
404-688-1202
sbright@schr.org

* *Counsel of Record*

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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ARGUMENT

The State argues for the first time in the history of this case that the prosecution's race-coded lists and notes singling out the black prospective jurors were made in response to "a jury array challenge and a preordained *Batson* challenge to any and all peremptory challenges to black prospective jurors." State's Br. at 18. This, according to the State, required the prosecution "to maintain detailed information on the individual black prospective jurors." State's Br. at 23. The State did not provide this explanation in the habeas court below,[1] in the Georgia Supreme Court when opposing review of the habeas court's ruling,[2] or even in opposing certiorari in this Court.[3]

When Foster introduced the prosecution's lists and notes in the habeas court, the State filed terse two-page affidavits in which each prosecutor asserted that he did not highlight the black prospective jurors in green on the venire lists or instruct anyone else to

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[1] *See* H.R. 1340-64 (making no suggestion that the notes were made in response to the *Batson* motion).

[2] *See* Response in Opposition to Application for Certificate of Probable Cause to Appeal at 5-15, *Foster v. Humphrey*, No. S14E0771 (Ga. July 1, 2014) (making no suggestion that the notes were made in response to the *Batson* motion).

[3] *See* Brief in Opposition [to Certiorari] on Behalf of Respondent at 4-25, *Foster v. Chatman*, No. 14-8349 (U.S. Mar. 9, 2015) (making no suggestion that the notes were made in response to the *Batson* motion).

do so. J.A. 168-71.[4] Neither affidavit mentions the theory now advanced by the State.[5]

The lists and notes focusing on the race of individual prospective jurors in Foster's venire would have had no bearing on Foster's challenge to the jury array. The challenge was denied at a pretrial hearing after the court clerk produced a certificate showing that black citizens were not underrepresented in the master jury pool of 7,500 from which the 179 prospective jurors summoned for the case were drawn.[6] The prosecutors were aware that the composition of the

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[4] Beyond that, District Attorney Stephen Lanier stated only, "I reaffirm my testimony made during the motion for new trial hearing as to how I used my peremptory jury strikes and the basis and reasons for those strikes." J.A. 169. Assistant District Attorney Douglas Pullen added only, "I did not rely on the highlighted jury venire list in making my decision on how to use my peremptory jury strikes." J.A. 171.

[5] The State could have included statements in the affidavits by the prosecutors as well as any materials from their files that existed to support its new explanation. Thus, there is nothing to the State's argument that Foster did not establish that the lists and notes he introduced "were a complete copy of the district attorney's file or a complete copy of all the notes relevant to jury selection." State's Br. at 9, n.8. Because Foster presented ample evidence of discrimination, he was not required to show that the evidence he presented was everything that existed.

[6] *See* T.R. 271-72 (trial court's order); P.T. 2-26 (Apr. 15, 1987) (transcript of hearing); P.T. State's Ex. 2 (Apr. 15, 1987) (certificate from the clerk).

master jury pool, not the venire drawn for a particular trial, is what matters for such a challenge.[7]

As for *Batson*, the State's newfound theory is sharply contradicted by the content of the lists and notes. The black prospective jurors were ranked against each other in case "it comes down to having to pick one of the black jurors." J.A. 345. The five black jurors were prioritized for peremptory strikes. J.A. 301. Race is emphasized from the venire lists to the notes to the strike lists, showing an overriding focus on the race of the black prospective jurors.[8]

Other notes undermine the prosecutors' credibility. All of the prosecutors' strike lists show that they intended to strike Marilyn Garrett, J.A. 287-90, 299-300, 301, 348-49, and were not telling the truth when they said they nearly accepted her as a juror, T.R. 438-39. A note on the Church of Christ states, "doesn't

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[7] *See* P.T. 21-24 (Apr. 15, 1987) (argument by Lanier relying on *Frazier v. United States*, 335 U.S. 497, 507-08 (1948), and *White v. State*, 196 S.E.2d 849, 853 (Ga. 1973)). In addition, the relevant documents – strike lists, juror questionnaires, descriptions of individual jurors, and venire lists highlighted and circulated to help "pick a good jury," H.T. 220 – were obviously prepared for jury selection.

[8] The State suggests that the prosecutors "could not know with certainty what they had to show in the second and third steps of the *Batson* inquiry." State's Br. at 22. But the required showing was stated clearly in *Batson*: upon a finding of a prima facie case, the prosecution must come forward with race-neutral reasons for its strikes. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). As Lanier told the trial court, "All I have to do is have a race neutral reason. . . " J.A. 48.

take a stand on Death Penalty," J.A. 302, yet the prosecution claimed that the church "definitely takes a stand against the death penalty" as a reason for striking Eddie Hood, J.A. 46.

There is no question that the prosecutors used the lists and notes, which came from the prosecution's file and were certified as such. J.A. 247. District Attorney Stephen Lanier testified that just two other people were involved in jury selection: Douglas Pullen, an assistant district attorney, and Clayton Lundy, Lanier's chief investigator, who "was involved in all aspects of it." J.A. 81-82. Lanier, Pullen, and Lundy worked closely together[9] and relied heavily on their notes,[10] which they refused to disclose, J.A. 78-79. Lanier testified that during the weekend between the completion of voir dire and the striking of the jury, the prosecution team selected "who we would strike on Monday morning." J.A. 82. Their selections are set out on strike lists, which they followed precisely when striking the jury, as the State concedes.[11] The source

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[9] *See* J.A. 99 (Pullen and Lanier agreeing that they had "extensive discussions on the selection of this particular jury"); J.A. 101 (Lanier stating that he adopted his views about the Church of Christ from Pullen); J.A. 343-47 (Lundy stating in his draft affidavit that he conducted background checks on the black prospective jurors and shared his findings with Lanier and Pullen).

[10] *See* J.A. 55 (Lanier referring to what "Doug Pullen put down in his notes"); T.R. 438 (the prosecutors stating that they had, in their jury notes, listed Garrett as "questionable").

[11] State's Br. at 28. The State notes a single exception, alternate William Jeffrey Howell, who was marked "N," J.A.

(Continued on following page)

of the lists and notes, their timing, and their purpose is hardly "unknown" or based on "conjecture," as the State asserts. *See* State's Br. at 27-28.[12]

The reasons proffered for the strikes of Garrett and Hood also reinforce the discriminatory meaning of the lists and notes and undermine the prosecutors' credibility. The State does not even address many

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300, 301, 349, but was not struck, J.A. 33. State's Br. at 28. The reason is that the jury was selected before reaching prospective juror Bobbie Grindstaff, whom the prosecution had designated for a strike. J.A. 31. Thus, the prosecutors used only nine of their ten strikes in selecting the jury, and Grindstaff was moved to the alternate pool. J.A. 31-32. But the prosecutors, who had already designated two other prospective alternates for strikes, had only two strikes for alternates. They used the strikes against Grindstaff and another prospective alternate designated for a strike and accepted Howell. J.A. 33-34.

[12] *See Miller-El v. Dretke*, 545 U.S. 231, 264, 266 (2005) (relying on notations on juror cards and a manual on jury selection despite a dissent arguing that the use of them could not be known because "Miller-El never asked" the prosecutors about the manual and the prosecutors "were never questioned about their use of [the jury cards]," *id.* at 306-07 (Thomas, J., dissenting)). In other contexts, courts have reasoned that documents that were in an individual's possession can be probative of that individual's actions and intent, particularly when the documents are closely related to the actions at issue in the case. *See, e.g., United States v. Walters*, 351 F.3d 159, 168 (5th Cir. 2003) (reasoning that portions of a book that were "pertinent to making a bomb similar to the one that exploded at the base were relevant to show [the defendant's] knowledge and ability to make such a device"); *People v. Mertz*, 842 N.E.2d 618, 654 (Ill. 2005) (concluding that books owned by the defendant were "sufficiently related to defendant's act of arson to support admission").

reasons that are unsupported by the record. For example:

- One of the principal reasons given for the strike of Garrett was "her age being so close" to Foster. J.A. 56. Garrett was thirty-four and Foster was nineteen. J.Q. #86 at 1; T.R. 588.

- The prosecutors said they struck Garrett because she was a social worker, J.A. 95, 102-03, but she was not a social worker, J.Q. #86 at 2; T.T. 953-54.

- Lanier asserted that he struck Hood because he "avoided eye contact" and "[a]s a personal preference, eye contact is highly valued as a jury selection technique." T.R. 424. But this "personal preference" was taken verbatim from a reported case.[13] *Batson* provides no protection against discrimination if a prosecutor can justify a strike simply by reading a reason from a case or list.

- Another reason given for the strike of Hood was that the defense lawyers did not ask him about his involvement in social or fraternal organizations. J.A. 47. But Hood had answered on his questionnaire that he was not a member of any social or fraternal organizations, J.Q. #9 at 4, and the defense lawyers did

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[13] *See United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987) (same statement).

> not ask *any* prospective jurors about their involvement in such organizations.

The State also declines to acknowledge that many of the reasons provided by the prosecutors are inconsistent with each other. It does not distinguish between the reasons the prosecutors gave at the *Batson* hearing and the additional reasons they piled on later, such as the false representation that Garrett was a social worker, J.A. 95, 102-03, and the assertion that they struck Garrett because her cousin had a drug arrest, even though they acknowledged on the record that they did not know about the arrest when they struck her, P.T. 8-9 (May 1, 1987).[14] And the State does not address the fact that the prosecutors did not ask *any* questions in voir dire about *any* of the reasons they later gave for striking Garrett and Hood.

Taken together, the lists and notes from the prosecution's files and the suspicious and shifting explanations – changing from the *Batson* hearing to the motion for new trial, and again to the new explanation for the notes provided for the first time in this Court – make clear that the prosecution was engaged

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[14] Although this separately paginated transcript states the date as April 20, 1987, which was the first day of the trial, it also states that it reflects a "hearing held at the bench after the trial of the case and sentencing phase." The sentencing phase concluded on May 1, 1987. T.T. 2547.

in race discrimination when it struck all of the black prospective jurors.[15]

I. The Prosecution's Notes Are Not Consistent With Preparation for Defending Against a *Batson* Objection.

If the point of the prosecution's notes was to prepare to defend against a *Batson* objection, there would have been no reason to rank the black prospective jurors against each other to identify which "[m]ight be the [b]est one to put on [the] jury," J.A. 294, in case "it comes down to having to pick one of the black jurors," J.A. 345, or "if we had to pick a black juror," J.A. 345. The State argues that these statements are ambiguous, State's Br. at 26-27, but "having to pick" and "if we had to pick" clearly mean doing something against one's preference; the language reveals an intention to avoid accepting a black prospective juror unless forced to do so. The two statements about having to pick a black juror were deleted from investigator Clayton Lundy's affidavit

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[15] The prosecutors struck all four black prospective jurors and made it clear that they would have struck another, Shirley Powell, if she had not been excused for cause on the morning of jury selection. *See* T.R. 439 ("The State was not, under any circumstances, going to take [Powell]."); *see also* J.A. 301 (Powell on the list of "Definite NOs"). Although Foster centers his claim on the strikes of Garrett and Hood, "[i]t goes without saying that [a step three analysis under *Batson*] includes the facts and circumstances that were adduced in support of the prima facie case." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

before the prosecutors filed it in the trial court. T.R. 555-57.

The State also asserts that the statements in Lundy's draft support the prosecutors' claim that they *wanted* a black juror. State's Br. at 12, 26-27. The prosecutors said nothing about wanting black jurors at the original *Batson* hearing. At that hearing, they insisted that "[r]ace is not a factor," but that other considerations such as gender, age, and religious affiliation were. J.A. 41. Later, at the hearing on the motion for a new trial, the prosecutors claimed that they "actively look[ed] for black jurors" and even discussed "taking several black jurors to avoid the white-lynch-mob argument the defense lawyers will make to jurors during the sentencing phase of the trial." J.A. 100. The prosecutors never explained how such a "lynch mob" argument might have been made. Their purported fear of the argument did not keep them from striking all the black prospective jurors, and no such argument was made by the defense.

In further explaining their newly announced desire to have black jurors, the prosecutors pointed out that their primary witness at the guilt phase was Lisa Stubbs, Foster's girlfriend, who was black. J.A. 100; State's Br. at 26.[16] But they had previously told

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[16] Even if this were true, it would only further suggest discrimination. The point of *Batson* is to prohibit strikes based on the assumption that jurors will view a defendant, witness, or victim more sympathetically if they are of the same race. *See*

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the trial court, immediately after jury selection, that their choices about the jury had nothing to do with the guilt phase; they were confident of obtaining a conviction and were "looking at this case primarily for the death penalty." J.A. 57. It makes little sense that prosecutors who were confident of a conviction really wanted black jurors because of their black witness at the guilt phase. It is far more likely – and consistent with all the evidence – that the prosecutors did *not* want black jurors for fear that they would be sympathetic to the black defendant at the penalty phase.

The sheer quantity of references to the race of the black prospective jurors in the prosecution's file also belies the suggestion that the notes are "facially neutral" and that *Batson* preparation explains them all. State's Br. at 1. The "B" next to the name of each black panelist, the green highlighting, the circling of the word "BLACK" on the juror questionnaires, the labeling of black panelists as "B#1," "B#2," and "B#3," and the note identifying the Church of Christ as a "Black church" all demonstrate that race was the dominant factor in the prosecution's jury selection process. It is thus apparent that the materials from the prosecution file were not about preparing for a *Batson* hearing, but about preventing all of the black prospective jurors from serving on the jury.

J.E.B. v. Alabama, 511 U.S. 127, 153-54 (1994) (Kennedy, J., concurring).

II. The Lists and Notes Show That the Prosecution Misrepresented Its Willingness to Accept Marilyn Garrett.

The State argues that "[Marilyn] Garrett's demeanor in court during voir dire revealed qualities no prosecutor wants in a juror," State's Br. at 45, and "no prosecutor would risk placing an individual on a jury who was misleading during voir dire," State's Br. at 46. But only a few pages later, the State defends the prosecutors' representations that they nearly accepted Garrett. State's Br. at 49-51. The prosecutors could not possibly have viewed Garrett as *both* a juror they almost accepted *and* a juror who was completely unacceptable.

The prosecutors' strike lists show that they did not intend to accept Garrett as a juror. The State quibbles over the meaning of the lists and which prosecutor may have prepared a particular list, State's Br. at 49-51, but Garrett was designated to be struck on *all of the strike lists*, which the prosecutors followed precisely in striking the jury. J.A. 287-90, 299-300, 301, 348-49. The meaning of the lists and the objectives of the prosecutors are clear.

Although they asked Garrett only seven yes/no questions which required seven words to answer, T.T. 952-53, the prosecutors gave at least eight reasons for striking her at the *Batson* hearing, all of which were unrelated to the questions they had asked, J.A. 55-57. They reiterated those reasons and added two more at the motion for new trial hearing. J.A. 95, 102-03, 105.

Yet in a brief, they claimed that Garrett was acceptable and almost selected as a juror. According to the brief, "the state had, in his [sic] jury notes, listed [Garrett] as questionable," T.R. 438, and only decided to strike her after it gained "an additional strike" when Shirley Powell was excused for cause on the morning of jury selection, T.R. 439. This implied that Garrett would have been a juror if not for Powell's excusal. The prosecutors claimed they then chose between Garrett and another juror, "the only two questionable jurors the State had left on the list," and decided to strike Garrett. T.R. 439.[17]

But the State was not actually willing to accept Garrett. Lanier, Pullen, and Lundy prepared lists of the prospective jurors they planned to strike the weekend before the jury was struck. J.A. 82. Two lists contained the names of all of the prospective jurors with "N" for "No" before and after each of the jurors to be struck. J.A. 287-90, 299-300, 348-49.[18] Another list was divided into "Definite NOs," "Questionables," and "Alternates." J.A. 301. This was the only list that contained "Questionables."[19] The same prospective

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[17] This assertion was made only in the brief; it was not mentioned at the *Batson* hearing or the motion for new trial hearing. The trial court relied upon the prosecutors' purported willingness to accept Garrett in upholding the strike. J.A. 142-43.

[18] The list at J.A. 348-49 is a copy of the list at J.A. 299-300 noting the substitution of two jurors.

[19] The State argues that Lundy's draft affidavit supports the prosecutors' claim that Garrett was questionable because it

(Continued on following page)

jurors – including all five black prospective jurors who remained in the venire over the weekend – were marked for strikes on all of the lists. J.A. 287-90, 299-300, 301, 348-49. Garrett was not listed as "Questionable." J.A. 301. Like the other black prospective jurors, she was listed under "Definite NOs." J.A. 301. The prosecutors struck every person marked to be struck on the lists except Powell, who was excused for cause, and an alternate.[20]

The prosecutors' other actions with regard to Garrett further reveal their true intentions and lack of credibility. At the motion for new trial hearing, they claimed they struck her because she was a social worker, J.A. 95, 102-03, and they "wanted to stay away from any social worker" in accordance with the "universal[ ]" attitude that prosecutors have toward social workers. J.A. 102-03. But Garrett was not a social worker.[21] They also added that they struck Garrett because her cousin, Angela Garrett, had been charged with a drug offense. J.A. 105; T.R. 425. But they had not given that reason at the *Batson* hearing,

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states, "Garrett might be okay." State's Br. at 51 (citing J.A. 345). However, the full statement from which that quote was taken is this: "If it comes down to having to pick one of the black jurors, Ms. Garrett, might be okay." J.A. 345.

[20] The prosecutors had three alternates marked for exclusion but only two strikes. *See supra* n.11.

[21] As stated on her questionnaire and in voir dire, Garrett was a teacher's aide. *See* J.Q. #86 at 2 ("Teacher's Aide – help teacher as needed with 20 children"); T.T. 953-54 (stating that she worked thirty hours a week as a teacher's aide).

and Lanier told the trial court after the death verdict was returned:

> It has come to our attention *since the trial of this case* that Angela Garrett whom the Metro Drug Task Force has just arrested for cocaine, who is a teacher at a school and has been subsequently dismissed from school because of the drug problem.

P.T. 9 (May 1, 1987) (emphasis added).

Thus, the contradictory positions, the lack of any serious questioning on voir dire, and the prosecutors' explanations for their strike of Garrett "do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny." *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005).

III. The False and Indefensible Reasons Given by the Prosecutors for Their Strikes Show Their Intent to Discriminate and Lack of Credibility.

The totality of the circumstances shows that the prosecutors struck the black prospective jurors because they were black and then gave reasons that were false, contradictory, or unsupported by the record. They cared so little about the reasons that they did not question the prospective jurors about them during voir dire.

Several of the reasons given for the strikes simply were not true. As previously discussed, the prosecutors said that they struck Marilyn Garrett because she was a social worker, J.A. 95, 102-03, which she was not, and because her cousin was arrested on drug charges, J.A. 105, even though they were unaware of the charges when they struck the jury, P.T. 8-9 (May 1, 1987). The Georgia Supreme Court upheld the strike based on those two reasons. J.A. 151. Another reason the prosecution gave for striking Garrett was "her age being so close" to Foster's. J.A. 56. Garrett was thirty-four, J.Q. #86 at 1; Foster was nineteen, T.R. 588. The State does not defend this reason in its brief.

In explaining his strike of Eddie Hood, Lanier expressed his "personal preference" that "eye contact is highly valued as a jury selection technique" and Hood "avoided eye contact with the prosecutor." T.R. 424. However, this "personal preference" was taken verbatim from a reported case.[22] The State does not address this in its brief, but it is a significant issue. If *Batson* requires no more than that a party give "race neutral" reasons upheld in other cases, it would render the Equal Protection Clause "a vain and

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[22] *See United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987) ("[S]he avoided eye contact with the prosecutor. As a personal preference, eye contact is highly valued as a jury selection technique."). Lanier gave the reason verbatim, without using quotation marks or citing *Cartlidge*, in his post-trial brief, T.R. 424, and later cited *Cartlidge* in his argument at the motion for a new trial hearing, J.A. 117.

illusory requirement," which *Batson* was intended to prevent. *Batson v. Kentucky*, 476 U.S. 79, 98 (1986) (quoting *Norris v. Alabama*, 294 U.S. 587, 598 (1935)).[23]

Another reason given for the strike of Hood was that the defense did not ask him any questions about his membership in social or fraternal organizations. J.A. 47. But Hood answered in his questionnaire that he did not belong to any social or fraternal organizations, J.Q. #9 at 4, and the defense did not question *any* prospective jurors about their membership in such organizations. The State defends the prosecutors' alleged concern about defense questioning without mentioning social or fraternal organizations. State's Br. at 41-42. But the reason stated at the time of jury selection is what matters – not a sanitized version advanced later.[24]

The prosecution also changed its explanation for striking Hood. At the *Batson* hearing, Lanier stated that "[t]he only thing that [he] was concerned about" with regard to Hood was that he had "an eighteen year old son which is about the same year old as the

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[23] The practice of reading from a list of previously upheld reasons is not uncommon. *See* Brief of Joseph diGenova et al. as Amici Curiae at 7-8, *Foster v. Chatman*, No. 14-8349 (U.S. July 31, 2015).

[24] *See Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) ("If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.").

defendant," J.A. 44; yet he stated at the hearing on the motion for new trial, "the bottom line on Eddie Hood is the Church of Christ affiliation." J.A. 110-11. The State does not address Lanier's shifting rationale.

The prosecutors' purported concern about the Church of Christ – that it was against the death penalty, J.A. 46 – was also inconsistent with its notes, which stated explicitly that the church did not take a position on the death penalty. J.A. 302. A few questions in voir dire would have established whether Hood had any knowledge of the church's position on the death penalty and, if so, whether he followed it. But no such questions were asked.[25]

The pretextual character of the prosecution's reasons is reinforced by Lanier's closing argument that the all-white jury should impose a death sentence to "deter other people out there in the projects."

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[25] The prosecutors also claimed that three white members of the Church of Christ – Vonda Waters, Gertrude Green, and Thelma Terry – were excused for cause "due to feeling against the death penalty." T.R. 435. This was not true. *See* Pet. Br. at 44-45. The State concedes that Waters was excused because she was pregnant. State's Br. at 39. It claims that Green's answers were unclear, State's Br. at 39, but Green said she could vote for death, but not life, T.T. 729. As for Terry, she expressed her belief that she did not "have the right to decide whether a person should live or die" in her questionnaire, J.Q. #35 at 5, but she was not questioned about it during voir dire because she answered, "Yes, sir," to one of the judge's first questions, "And you have made up your mind already as to the guilt of the accused?" T.T. 558.

T.T. 2505. The State attempts to neutralize the argument by stating that "[t]he housing project area was where White lived and the crime occurred." State's Br. at 3 n.1. But the victim, who was white, did not live in the projects; she lived near them.[26] Foster was among the black people who occupied thirty-two of the thirty-four units in the projects. T.R. 551. The close proximity of the victim's neighborhood to the nearly all-black impoverished projects was made clear to the jury in the prosecution's opening statement, T.T. 1592, and in testimony, T.T. 1628, 1783, and it provides the context for Lanier's racially divisive argument.[27]

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[26] *See* T.T. 1628 (White's next door neighbor testifying that the projects were "right near" where they lived); T.T. 1783 (police officer testifying that it is "about three blocks" from White's home to the projects). White lived on Highland Circle, T.T. 1604; the projects were on Church, Stonewall, and Waddell Streets, T.R. 551.

[27] Even without such proximity, as this Court observed the year before Foster's trial, there is "a unique opportunity for racial prejudice to operate" in the sentencing phase of a capital case involving a black defendant and a white victim. *Turner v. Murray*, 476 U.S. 28, 35 (1986). The Court noted, "Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty." *Id.* Lanier's closing argument increased the risk that such prejudice would play a role in the jury's decision.

IV. This Court Has Rejected the State's Position That Juror Comparisons Are Probative Only if the Jurors Are Identical.

The State argues that Foster's juror comparisons are not probative because there were not any white prospective jurors to whom *all* the proffered reasons also applied. State's Br. 33, 36-42, 46-49. But a petitioner invoking the protection of *Batson* is not required to identify prospective jurors with identical characteristics to make meaningful comparisons. As this Court has explained:

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. . A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

Miller-El v. Dretke, 545 U.S. 231, 247 n.6 (2005). This is particularly true when the prosecution proffers eight to twelve reasons for striking a prospective juror, such that there will never be another juror to whom all the same reasons apply. If the State's view were correct, then prosecutors would have every incentive to proffer as many reasons as possible, whether genuine or not, because doing so would defeat almost any comparative juror analysis.

White prospective jurors Martha Duncan, Arlene Blackmon, and Don Huffman were not identical in all

respects to Garrett and Hood.[28] But that does not diminish the importance of the comparisons, especially since the prosecutors did not ask Garrett or Hood *any* questions in voir dire about *any* of the reasons they later claimed for striking them, which they "probably would have done if the [reasons] had actually mattered."[29]

The prosecutors said they struck Garrett because she worked with low-income children at Head Start, J.A. 56, where she was a teacher's aide, J.Q. #86 at 2. The State argues that the same concern did not apply to Duncan, a white teacher's aide who worked at a nearby school, T.R. 430, because there was no indication that she worked with low-income children. State's Br. at 46. But the prosecutors did not ask Garrett or Duncan about the children with whom they worked, T.T. 952-53, 961-63, which would have been the obvious course of action if they were actually

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[28] Duncan, Blackmon, and Huffman all shared multiple characteristics with Garrett or Hood. *See* Pet. Br. at 48-49.

[29] *See Miller-El v. Dretke*, 545 U.S. at 246 ("[T]he prosecution asked nothing further about the influence his brother's history might have had on Fields, as it probably would have done if the family history had actually mattered."); *United States v. Odeneal*, 517 F.3d 406, 421 (6th Cir. 2008) ("The failure of the prosecution to inquire regarding a reason purported to be a basis for a juror's dismissal serves as evidence of discrimination.").

concerned about the jury including teacher's aides who worked with low-income children.[30]

Similarly, the prosecutors stated that *any* affiliation with Northwest Georgia Regional Hospital was a basis for striking black prospective jurors, J.A. 51, but they accepted Arlene Blackmon, a white juror who had worked at the hospital, J.Q. #83 at 2; J.A. 29. One reason asserted for the strike of Hood was that his wife worked at the hospital, J.A. 45, where she was a supervisor in food services, J.Q. #9 at 2. Lanier said: "Northwest Regional deals a lot with mentally disturbed, mentally ill people, and *I did not want anybody* from Northwest Georgia Regional. My experience in the past where insanity cases are involved [is] that they intend [sic] to be more sympathetic and are for the underdog." J.A. 45 (emphasis added). The prosecutors did not ask Hood any questions about what his wife did at the hospital, whether she had any interaction with the patients or mental health staff, or whether she discussed her work with him. T.T. 274-78.

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[30] The prosecutors also accused Garrett of being untruthful in answering "[n]o" when the trial judge asked her, "Are you familiar with [the] neighborhood where [the victim] lived, North Rome?" J.A. 55-56; T.T. 950-51. However, Martha Duncan also said "[n]o" when she was asked, "Are you familiar with the neighborhood in which [the victim] lives?" T.T. 959. The prosecutors did not strike Duncan for being untruthful. Instead, they accepted her *because* she lived and worked near the victim's neighborhood. T.R. 430. They did not ask Garrett or Duncan any follow-up questions about their knowledge of the neighborhood. T.T. 952-53, 961-63.

With regard to Mary Turner, another black prospective juror struck by the prosecution, Lanier said: "[S]he worked at Northwest Regional [Hospital]. Again, I did not want jurors who worked at Northwest Georgia Regional *regardless of their capacity*." J.A. 51 (emphasis added).[31] As with Hood, the prosecutors did not ask Turner any questions about her work at the hospital. T.T. 595-98.

However, the prosecutors questioned Blackmon about her work at the hospital – what she did there and whether she had any training in psychiatry, psychology, or mental health. T.T. 939. The prosecution's purported concerns about the hospital are simply not credible given their lack of any voir dire of Hood and Turner on the subject and their acceptance of Blackmon.

V. The Evidence Establishes Discrimination Under Any Standard of Review.

The evidence in this case entitles Foster to *Batson* relief under any standard of review. The prosecutors focused on the race of the black prospective jurors in their notes, struck all four black prospective jurors, gave reasons for the strikes that were false, incredible, and contradictory, and argued to the

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[31] At the time of Foster's trial, Turner no longer worked at the hospital; she worked for the Community TB Control Unit. J.Q. #38 at 2.

all-white jury that it should impose a death sentence to deter people in the projects.

Although a typical *Batson* claim involves clear error review, this Court has recognized that the circumstances of a particular case may render the deference accorded under that framework inappropriate.[32] Here, the trial court held that the prosecutors did not violate *Batson*, but at that time, the prosecutors had successfully withheld their lists and notes, which provide critical evidence of discrimination. The same defect vitiated the Georgia Supreme Court's decision to reject Foster's *Batson* claim on direct appeal. The state habeas court admitted the lists and notes, but did not consider the totality of the circumstances by evaluating the notes along with the other evidence of discrimination. Instead, it relied primarily on the decisions of the trial court and the Georgia Supreme Court, J.A. 193, 196, and the assertions of good faith by Lanier, Pullen, and Lundy, J.A. 193-94.[33] Therefore, its ruling is not entitled to deference. This Court should consider the claim without deference to the state habeas court and hold that Foster has established purposeful discrimination.

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[32] *See Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (explaining that "exceptional circumstances" may render deference inappropriate).

[33] *See Batson v. Kentucky*, 476 U.S. 79, 97 (1986) ("Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.' ") (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

If this Court determines that clear error is the appropriate standard, there are not "two permissible views" of the evidence in this case. *Hernandez v. New York*, 500 U.S. 352, 369 (1991). The only explanation that provides a realistic account of all the evidence – from the lists and notes to the shifting and implausible reasons to the closing argument – is racial discrimination.

CONCLUSION

For the foregoing reasons and the reasons advanced in Foster's principal brief, Foster respectfully requests that this Court reverse the decision of the Superior Court of Butts County, Georgia.

Respectfully submitted,

STEPHEN B. BRIGHT*
PATRICK MULVANEY
PALMER SINGLETON
KATHERINE CHAMBLEE
SOUTHERN CENTER FOR
HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, GA 30303
404-688-1202
sbright@schr.org

* *Counsel of Record*

Counsel for Petitioner

No. 14-8349

IN THE

Supreme Court of the United States

TIMOTHY TYRONE FOSTER

Petitioner,

v.

BRUCE CHATMAN, WARDEN

Respondent.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF JOSEPH DIGENOVA, GIL GARCETTI, GLENN F. IVEY, ROBERT M. A. JOHNSON, HARRY L. SHORSTEIN, LARRY D. THOMPSON, SCOTT TUROW, AND JOHN VAN DE KAMP AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

PAUL M. SMITH
Counsel of Record
MICHAEL B. DESANCTIS
EMILY A. BRUEMMER
MANUEL C. POSSOLO*
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

*Not admitted in Washington, D.C.; practicing under the supervision of the partnership of Jenner & Block, LLP.

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INTEREST OF *AMICI CURIAE*[1]

Amici are former prosecutors who recognize, and refuse to condone, the blatant illegality of the prosecutorial misconduct at issue in this case: specifically, the racially discriminatory use of strikes during jury selection to ensure that a black defendant accused of a crime against a white victim would face an all-white jury.

Joseph diGenova served as United States Attorney for the District of Columbia from 1983 to 1988 and as an Assistant United States Attorney in the District of Columbia from 1972 to 1975 and again from 1982 to 1983.

Gil Garcetti was elected to two terms as the District Attorney for Los Angeles County, serving from 1992 to 2000; prior to his election, he served as a trial prosecutor in the office for over 20 years and was also appointed as chief deputy district attorney.

Glenn F. Ivey was elected to two terms as the State's Attorney for Prince George's County—the second most populous county in the State of Maryland—serving from 2003 to 2011. He also served as an Assistant United States Attorney for the District of Columbia from 1990 to 1994.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of this brief have been filed with the Clerk's Office together with this brief.

Robert M. A. Johnson was the elected County Attorney for Anoka County, Minnesota, from 1982 to 2010 and was also President of the National District Attorneys Association from 2000 to 2001.

Harry L. Shorstein was elected to four terms as the State's Attorney for Florida's Fourth Judicial Circuit, encompassing the City of Jacksonville and Clay, Duval and Nassau Counties, serving from 1991 to 2008.

Larry D. Thompson was Deputy United States Attorney General from 2001 to 2003 and served as the United States Attorney for the Northern District of Georgia from 1982 to 1986.

Scott Turow was an Assistant United States Attorney for the Northern District of Illinois from 1978 to 1986.

John Van De Kamp served as Attorney General of the State of California from 1983 to 1991 and previously served as the Los Angeles County District Attorney from 1975 to 1981.

Amici support Petitioner's argument that the Georgia courts erred in failing to recognize a clear constitutional violation under *Batson v. Kentucky*, 476 U.S. 79 (1986). Based on the record in this case, the judgment below should be reversed and remanded.

SUMMARY OF ARGUMENT

Nearly three decades after *Batson v. Kentucky* was decided, race discrimination persists in jury selection. Numerous studies demonstrate that prosecutors use peremptory strikes to remove black jurors at significantly higher rates than white jurors. Some

prosecutorial misconduct is shockingly blatant, but most discrimination occurs under the guise of purportedly "race-neutral" justifications prepared by prosecutors with the specific objective of defeating *Batson* challenges. Some prosecutors have even provided trainings that encourage racial discrimination and explain how to conceal improper motivation from the courts.

Race discrimination in juror selection cannot be condoned. Indeed, this Court has long recognized that such discrimination causes serious and widespread harm: to the defendant, whose constitutional rights are violated; to the juror, who is excluded from the judicial process; and to our justice system, which is undermined by such inequality.

The prosecution's conduct in this case clearly violates *Batson*'s rule. The prosecutor struck all black potential jurors, and the evidence of purposeful discrimination is overwhelming: in its jury selection notes, the prosecution singled out black prospective jurors for removal and even ranked the black prospective jurors against each other. The prosecution then presented eight to ten "race-neutral" reasons for each strike, many of which were inaccurate; inconsistent with other reasons; or applied with equal or greater force to white jurors who were not struck. In addition, the prosecutor's reasons have no basis in accepted trial strategy. If this Court does not find purposeful discrimination on the facts of this case, then it will render *Batson* meaningless.

Finally, *amici* declare that the persistence of race discrimination in jury selection is antithetical to the profession's best practices. Respected industry associations such as the National District Attorneys Association and the American Bar Association have promulgated standards for prosecutors which demonstrate that unconstitutional discrimination has no place in a conscientious prosecution. This Court's ruling in *Batson* is an important safeguard against such prosecutorial abuse.

ARGUMENT

I. RACE DISCRIMINATION CONTINUES TO BE A SERIOUS PROBLEM IN JURY SELECTION.

Even decades after *Batson* was decided, many prosecutors still exclude jurors based on their race. *See Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 268-69 (2005) (Breyer, J., concurring) (citing eight studies and anecdotal reports detailing widespread race discrimination in jury selection). Some of this discrimination gets caught, resulting in overturned convictions and new trials, but much race discrimination goes undeterred and undetected.

Numerous studies show that prosecutors use peremptory strikes against black jurors at significantly higher rates than against white jurors. In 2012, a North Carolina state court found, based on a published study of jury venires in 173 capital proceedings in North Carolina, that state prosecutors struck 52.8% of eligible black venire members, compared to only 25.7% of all other eligible venire members, meaning that black

jurors were more than twice as likely than white jurors to be removed by the prosecution, even when other characteristics one might expect to bear on the decision to strike were removed from the equation. *State v. Golphin*, No. 97 CRS 47314-15, slip op. at 153 (N.C. Super. Ct. Dec. 13, 2012). That same study found that, in cases where the defendant was black, the average strike rate against black venire members rose to 60.0%, while the strike rate against non-black venire members fell to 23.1%. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1549-50 (2012).

In a 2003 study of 390 felony jury trials prosecuted in Jefferson Parish, Louisiana, between 1994 and 2002, the Louisiana Crisis Assistance Center found that prosecutors struck black prospective jurors at more than three times the rate that they struck white prospective jurors. Richard Bourke, Joe Hingston & Joel Devine, Louisiana Crisis Assistance Center, *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Jefferson Parish District Attorney's Office* 1, 7-8 (2003).

In cases where the death penalty was imposed from 2005 to 2009, in Houston County, Alabama, state prosecutors used peremptory strikes to remove 80% of blacks qualified for jury service, with the consequence that half of these juries were all-white and the remainder had only a single black member, even though Houston County is 27% black. Equal Justice Initiative,

Illegal Racial Discrimination in Jury Selection: A Continuing Legacy 14 (2010).

Finally, in its 2010 review of jury selection procedures of eight southern states—Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee—the Equal Justice Initiative "uncovered shocking evidence of racial discrimination in jury selection in every state." *Id.* at 4. These studies are only a few examples.

Prosecutorial race discrimination is sometimes frighteningly overt. In 1986, Jack McMahon, an assistant district attorney in Philadelphia, created a training film teaching prosecutors to exclude young blacks from juries. He explains in the video that "blacks from the low-income areas are less likely to convict"; "you don't want those people on your jury"; "it may appear as if you're being racist, but again, you're just being realistic"; "young black women are very bad" because "they're downtrodden in two respects," namely "[t]hey are women and they're black" and "they somehow want to take it out on somebody and you don't want it to be you."[2]

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[2] L. Stuart Ditzen, Linda Loyd & Mark Fazlollah, *Avoid Poor Black Jurors, Mcmahon Said*, Phila. Inquirer, Apr. 1, 1997, http://articles.philly.com/1997-04-01/news/25529855_1_blacks-impartial-jury-young-prosecutors; *see also Former Philadelphia Prosecutor Accused of Racial Bias*, N.Y. Times, Apr. 3, 1997, http://www.nytimes.com/1997/04/03/us/former-philadelphia-prosecutor-accused-of-racial-bias.html.

Although prosecutors are at times surprisingly honest about their motivations, even admitted race discrimination does not always result in a finding of a *Batson* violation. *See, e.g., King v. Moore*, 196 F.3d 1327, 1333-35 (11th Cir. 1999) (upholding strike even though the prosecutor said she struck a juror because "[s]he is a young black female" and "Defendant is a young black male," because the prosecutor also cited the juror's attitudes about the death penalty); *id.* at 1335 (holding that "[w]hen the motives for striking a prospective juror are both racial and legitimate, *Batson* error arises only if the legitimate reasons were not in themselves sufficient reason for striking the juror").

Most discrimination, however, is veiled by purportedly "race-neutral" justifications prepared by prosecutors for the very purpose of defending their race-motivated strikes. In its 2010 review of capital cases in the south, the Equal Justice Initiative found that prosecutors all-too-often provide pretextual reasons to support the removal of black jurors, such as that those jurors have "low intelligence"; wear eyeglasses; are single, married, or separated; are too old for jury service at age 42 or too young at age 28; have relatives who attended historically black colleges; walk a certain way; chew gum; or live in a bad part of town. Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 4, 16-18 (2010); *see also Golphin*, No. 97 CRS 47314-15, at 113-19 (finding that, in numerous cited cases, state prosecutors in North Carolina have struck black venire members because of their association with historically black institutions, for their lack of

intelligence, due to unfavorable demeanor, and because they lacked a sufficient connection to the community).

This misconduct is not limited to rogue prosecutors. Some district attorney offices train their prosecutors to deceive judges as to their true motivations. For example, in 1995, the North Carolina Conference of District Attorneys presented a statewide training course, titled "Top Gun II," which provided a list of justifications for prosecutors to rely on when striking black jurors. *Golphin*, No. 97 CRS 47314-15, slip. op. at 73-74. One of the materials distributed at the training was a one-page handout titled "*Batson* Justifications: Articulating Juror Negatives." *Id.* This document provides a list of ten kinds of "justifications" a prosecutor might offer in response to a *Batson* challenge, including age, attitude, body language, and juror response. *Id.* Relying on these kinds of lists, some prosecutors have entered into the habit of offering a smorgasbord of justifications when their strikes are challenged, rather than pointing to the one or two reasons that actually motivated their conduct—be they race-based, or not. Courts have held that this practice of offering a "laundry list" of strike justifications is evidence of race discrimination. *See, e.g.*, *Sheets v. State*, 535 S.E.2d 312, 315 (Ga. Ct. App. 2000) (concluding that prosecutor's "'laundry list' of reasons for almost every strike" was evidence of race discrimination); *McGlohon v. State*, 492 S.E.2d 715, 717-18 (Ga. Ct. App. 1997) (affirming finding of purposeful discrimination where defendant "proffered a 'laundry list' of reasons for almost every strike, only some of which were facially neutral").

Race discrimination, to be sure, goes both ways—not only prosecutors, but also defendants, use peremptory strikes to remove jurors on the basis of their race. Whereas prosecutors tend to remove black jurors, defendants often strike white jurors at a disproportionate rate. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 53, 58 (2001) (finding, in a study of strike decisions over a seventeen-year period in 317 Philadelphia County capital murder trials, that prosecutors struck on average 51% of black jurors they could strike, compared to only 26% of comparable non-black jurors, whereas defense counsel struck only 26% of black jurors they had the opportunity to strike, compared to 54% of comparable non-black jurors); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 Law & Hum. Behav. 695, 697-99 (1999) (finding, in a study of peremptory strikes in thirteen noncapital felony trials in North Carolina, that prosecutors used 60% of their strikes against black jurors, who constituted only 32% of the venire, whereas defense attorneys used 87% of their strikes against white jurors, who made up 68% of the venire).

This kind of discriminatory conduct cannot be condoned. This Court has long recognized that race discrimination in jury selection harms not only the defendant on trial but also the excluded juror—indeed, that it denigrates whole classes of persons and undermines the integrity of our system of justice. *Miller-El II*, 545 U.S. at 238 (discrimination in jury selection "casts doubt over the obligation of the parties,

the jury, and indeed the court to adhere to the law throughout the trial" (quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991)); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) (such discrimination "causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded"); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) ("Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."); *Powers*, 499 U.S. at 412 (discrimination by prosecutors "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law"); *Batson*, 476 U.S. at 87 (race discrimination against jurors "harms not only the accused whose life or liberty they are summoned to try," but also "the excluded juror" and "the entire community," because "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice"); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), (discrimination against racial minorities is "an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others"), *abrogated on other ground by Taylor v. Louisiana*, 419 U.S. 522 (1975). Race discrimination in the judicial process also has profound societal consequences, causing racial backlash, violence in the community, and perpetuation of race stereotypes. Equal Justice Initiative, *Illegal Racial*

Discrimination in Jury Selection: A Continuing Legacy 38-41 (2010).

In light of this troubling evidence, this Court should send a clear message that blatant race discrimination will not be tolerated in jury selection, even if prosecutors are able to proffer post-hoc justifications for their strikes. Where, as here, the record shows that race played a substantial role in the decision to strike, the stain of racism cannot be washed away by the assertion that some other, "race-neutral" justification would have sufficed. Put differently, prosecutors should be encouraged to make sound trial decisions from the start, rather than well-crafted excuses after the fact.

II. THE PROSECUTION'S CONDUCT IN THIS CASE CLEARLY VIOLATED *BATSON v. KENTUCKY*.

The evidence in this case conclusively shows a *Batson* violation. The question presented involves an assessment of the evidence at the third and final stage of the *Batson* analysis, after the defendant has made a "prima facie showing" of racial discrimination and the prosecution has proffered "a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at 95, 97. Because the Georgia courts reached step three, the outcome here turns on whether Foster has established that the State engaged in purposeful discrimination. This determination requires courts to consider "all of the circumstances that bear upon the issue of racial animosity." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008); *see Miller-El II*, 545 U.S. at 240 (requiring consideration of "all relevant circumstances"); *Batson*,

476 U.S. at 96 (same). As this Court has further explained, "the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 338-39 (2003). Where there is clear evidence of racial motivation, the prosecution's neutral reasons should be viewed with particular suspicion.

The evidence of racial discrimination in this case is overwhelming. The prosecution singled out the black prospective jurors in at least *five* ways. First, it highlighted their names with a green marker on four different copies of the jury list. J.A. 253-78. Second, it marked their names with a "B" on those four jury lists. *Id.* Third, it circled the word "BLACK" in six prospective jurors' questionnaires. J.A. 311, 317, 323, 329, 334, 337. Fourth, it referred to three prospective jurors as "B #1," "B #2," and B #3" in its notes. J.A. 295-97. Fifth, it ranked black prospective jurors against each other in case "it comes down to having to pick one of the black jurors." J.A. 345.

In this context, the prosecution's proffered justifications for using its peremptory strikes to eliminate *every* remaining black prospective juror fail to meet any reasonable standard of "persuasiveness." *See Miller-El I*, 537 U.S. at 338-39. The prosecution provided eight to ten "race-neutral" reasons for each of the four strikes. Some of those justifications were blatantly inaccurate (one thirty-four-year-old potential juror was struck in part due to her "age being so close to the [nineteen-year-old] defendant," J.A. 56); some

were extreme exaggerations (that "theft by taking" arising from stealing hubcaps from a car, T.R. 446, is "basically the same thing that this defendant is charged with," where the defendant was facing a capital indictment for murder, burglary, and theft by taking, J.A. 45); and some directly contradicted others (one black juror "asked to be off the jury," J.A. 45, while another did *not* ask to be let off the jury, J.A. 56). Many of the reasons applied equally to white jurors who were allowed to serve—for example, Marilyn Garrett's occupation as a teacher's aide counted against her even though the prosecutor claimed to want jurors who were "associated with teachers" and accepted every white teacher and teacher's aide in the qualified pool. J.A. 56, T.R. 427, 429-30. The prosecution even gave reasons that applied with *greater* force to white jurors who the prosecution kept on the jury.[3]

The prosecution's notes reveal with unmistakable clarity that these "race-neutral" reasons resulted from a deliberate effort to conceal its racially motivated decision-making. For example, the prosecution falsely represented to the court that its notes list Marilyn Garrett as "questionable," T.R. 439, while its notes reveal that she was on the list of "definite NO's" along

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[3] For example, the prosecutor voiced concern that Hood's son was near the same age as the defendant. J.A. 44. When jurors were asked whether the defendant's age would be a factor in sentencing, Hood replied "none whatsoever," while a white juror with teenage sons replied "probably so." T.T. 280, 527. Hood was struck and the white juror was accepted.

with the rest of the remaining black jurors.[4] J.A. 301. These notes also reveal that a reason the prosecution gave for striking Eddie Hood—that "[h]is religious preference is Church of Christ"—was a pretext for race. J.A. 302. The prosecution represented to the trial court that the Church of Christ was problematic because "the Church of Christ definitely takes a stand against the death penalty," J.A. 46, but its notes written under the heading "Church of Christ" state that it "doesn't take a stand on Death Penalty," followed by, "NO NO Black Church." J.A. 302. Under these circumstances, it is unsurprising that the prosecutor stated at a post-trial hearing that "I don't want [defense counsel] to have access to my file." J.A. 79. As this Court concluded in *Miller-El v. Dretke*, "[t]he prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny." 545 U.S. at 265.

At the *Batson* hearing, the prosecutor articulated his view that "[a]ll I have to do is have a race neutral reason, and all of these reasons that I have given the Court are racially neutral." J.A. 48. That is not an accurate representation of the *Batson* standard applicable here. At step three, courts are tasked with determining whether the "relevant circumstances raise an inference that the prosecutor used [peremptory

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[4] The odds of randomly selecting all of the remaining black prospective jurors as the first five names on this list of "definite NO's" is approximately one in a million.

strikes] to exclude the [black] veniremen from the petit jury on account of their race." *Batson*, 476 U.S. at 96. This Court has explained that the "critical question in determining whether a prisoner has proved purposeful discrimination at step three" can hinge on the "credibility" of the prosecutor's justifications for the strikes. *Miller-El I*, 537 U.S. at 339. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id.*

The prosecutor's explanations for striking every black potential juror in this case have no "basis in accepted trial strategy." The purpose of peremptory challenges is to allow attorneys to eliminate "jurors who are clearly biased, as well as those whose impartiality is doubted even though there may be insufficient evidence to convince the trial judge to excuse the juror for cause." James J. Gobert et al., Jury Selection: The Law, Art and Science of Selecting a Jury § 8:1, Westlaw (database updated Dec. 2014). Peremptory strikes based on factual inaccuracies, internal contradictions, and explanations that apply at least as strongly to jurors whom the State accepted cannot possibly serve this purpose.[5] No logically—or

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[5] Moreover, an overarching jury selection strategy that the prosecutor claimed to be executing has been deemed by this Court to be an "unconstitutional proxy for juror competence and impartiality." *J.E.B.*, 511 U.S. at 129. At the *Batson* hearing, the prosecutor explained,

> [W]hen I look at a death penalty, I look for more reasons than race .... The gender, male or female, ... is something

legally—defensible trial strategy is advanced when a prosecutor eliminates a thirty-four-year-old black potential juror for being "so close" in age to a nineteen-year-old defendant, strikes black veniremen for asking to be let off the jury and *not* asking to be let off the jury, and discards only the black members of the jury pool who are "teachers [and] those associated with teachers." T.R. 427. In the absence of a plausible strategic justification for these strikes based on the "race-neutral" explanations articulated on the record, the clear inference to be drawn is that these reasons were pretextual.

Failing to find purposeful discrimination under these extreme circumstances would strip *Batson* of its meaning. In the words of one state court of appeals, "[r]ecent consideration of the *Batson* issue makes us wonder if the rule would be imposed only where the prosecutor states that he does not care to have an African-American on the jury." *People v. Randall*, 671 N.E.2d 60, 66 (Ill. App. Ct. 1996). Supreme Court approval of the prosecutor's tactics in this case would be tantamount to an answer in the affirmative. It would signal to prosecutors that, indeed, all they have to do is describe any non-racial characteristic of a

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> I always look at. [W]omen appear to be more sympathetic to jurors (sic) in a death penalty case than men. As indicative of the strikes that I used on my ten, I struck eight women. Eighty percent of my strikes were women.'

J.A. 41-42. This is precisely the type of strategy that this Court considers *unacceptable*. *J.E.B.*, 511 U.S. at 129 (extending *Batson* to gender discrimination).

racially undesirable juror—or, if in doubt, resort to vague demeanor-related explanations[6] that will forever be unverifiable by future courts.[7] This case is "replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race," *Miller-El II*, 545 U.S. at 265, and devoid of persuasive evidence indicating race-neutrality. *Amici* therefore urge this Court to reverse the decision below.

III. THE ACTIONS OF THE PROSECUTION DISREGARDED PROSECUTORIAL BEST PRACTICES.

Despite the persistence of race discrimination in jury selection, such discrimination is antithetical to accepted prosecutorial methodology. The ban on race discrimination under *Batson* does not impair the pursuit of a conscientious prosecution, but only

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[6] Here, the prosecutor characterized every black juror as some combination of nervous, slow, confused, hostile, bewildered, and incoherent—attributes that the record is inherently unable to reflect. J.A. 49-53.

[7] Prosecutors would be encouraged to pursue trial strategies that play to—and further entrench—race-based fears and stereotypes as well. In *Batson*, this Court recognized that "[d]iscrimination within the judicial system is most pernicious because it is a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Batson*, 476 U.S. at 87-88 (internal quotations omitted) (bracket in original). The advocacy by the prosecutor at Foster's trial for a death sentence to "deter other people out there in the [predominantly African-American inhabited] projects" serves as a prime example of the "stimulant" to racial prejudice that *Batson* aims to eliminate. T.T. 2505.

prevents prosecutorial abuse. It should be self-evident that a prosecutor's fulfillment of his or her function depends not only on seeking a conviction but on upholding constitutional principles and maintaining the public's faith in the rule of law—a charge in which there is no place for race discrimination. *See Batson*, 476 U.S. at 87 ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."). When prosecutors discriminate in the selection of jurors, they violate the Constitution and abdicate their responsibility to the public.

Amici, who are former prosecutors with many years of service to federal, state, and local governments, assert that race discrimination has no place in jury selection or in the prosecutorial function. Prosecutors who follow the profession's best practices in selecting a jury will not discriminate on the basis of race or other prohibited characteristics, and will thus not run afoul of the rule stated in *Batson*. These best practices, which should be apparent to the diligent prosecutor, have been clearly articulated by several leading industry associations.

The National Prosecution Standards of the National District Attorneys Association, which are now in their Third Edition, state that prosecutors "should not exercise a peremptory challenge in an unconstitutional manner based on group membership or in a manner that is otherwise prohibited by law."[8] The commentary

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[8] National District Attorneys Ass'n, National Prosecution Standards, Standard 6-2.3 (3d ed. 2009), *available at*

reminds prosecutors that, when they exercise peremptory challenges, they should be mindful that they are representatives of all people in their jurisdictions and "it is important that none of those people be obstructed from serving on a jury because of their status as a member of a particular group." Nat'l Prosecution Standards 6-2 Commentary. The pursuit of a deliberate strategy to exclude black jurors shows a complete disregard for the duty to represent all people in a prosecutor's jurisdiction.

Similarly, in February 2015 the American Bar Association's House of Delegates adopted the Fourth Edition of its ABA Standards for Criminal Justice: Prosecution and Defense Function.[9] These standards are intended to describe "best practices" for prosecutors. *See* ABA Crim. Justice Standard 3-1.1(b). With regard to jury selection, the standards provide that a prosecutor "should not strike jurors based on any criteria rendered impermissible by the constitution, statutes, applicable rules of the jurisdiction, or these standards, including race, sex, religion, national origin, disability, sexual orientation or gender identity." *See* Standard 3-6.3(b). There is no place for the blatant illegality at issue here.

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http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf ("Nat'l Prosecution Standards").

[9] Am. Bar Ass'n, Criminal Justice Standards for the Prosecution Function (4th ed. Feb. 2015), *available at* http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html ("ABA Crim. Justice Standards").

The American Bar Association's Commission on the American Jury Project has also published Principles for Juries and Jury Trials.[10] Principle 11(F) addresses peremptory strikes, stating: "No party should be permitted to use peremptory challenges to dismiss a juror for constitutionally impermissible reasons."

While these standards and principles are not binding law, they provide a clear statement of the values and ethical standards that should guide prosecutors as they undertake public service. As set forth in the ABA's Standards for Criminal Justice, the role of the prosecutor is "to seek justice within the bounds of the law." ABA Crim. Justice Standards 3-1.2(b). This important charge does not encompass the use of race discrimination in jury selection, as clearly established through the articulation of prosecutorial best practices by respected industry associations. *Amici*, relying on their extensive prosecutorial experience, view the conduct at issue here as a failure to uphold the standards of their profession. The prosecution in this case acted in a way that was clearly illegal and at odds with the values and responsibilities that prosecutors are bound to uphold.

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[10] Patricia Lee Refo, Am. Bar Ass'n, Am. Jury Project, *Principles for Juries and Jury Trials* (2005), available at http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf.

CONCLUSION

For the foregoing reasons, the judgment of the Georgia Supreme Court should be reversed and remanded.

Respectfully submitted,

PAUL M. SMITH
Counsel of Record
MICHAEL B. DESANCTIS
EMILY A. BRUEMMER
MANUEL C. POSSOLO*
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

Attorneys for Amici Curiae

* Not admitted in Washington, D.C.; practicing under the supervision of the partnership of Jenner & Block, LLP.

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